

MARK JENKINS MILLER

(Suspension)

On February 28, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Idaho Falls attorney, Mark J. Miller, from the practice of law for a period of five years.

The Idaho Supreme Court found that Mr. Miller violated the following Idaho Rules of Professional Conduct: (1) 1.2(a) [Failure to abide by client objectives], 1.3 [Lack of diligence], 1.4 [Lack of communication] and 1.16(d) [Failure to refund unearned fees or costs] with respect to three client matters; (2) 1.5(a) [Charge or collect of an unreasonable fee], 1.16(a) [Failure to withdraw when physical or mental condition materially impairs ability to represent client], 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], 8.1(b) [Failure to respond to Bar Counsel in connection with a disciplinary matter], and I.B.C.R. 505(e) [Failure to cooperate with or respond to a request from Bar Counsel] with respect to two client matters; and (3) 3.4(d) [Failure to comply with discovery requests] and 1.15(b) [Failure to deposit fees and expenses into client trust account or withdrawal of unearned fees] with respect to one client matter.

The Idaho Supreme Court's Disciplinary Order concluded a disciplinary proceeding that was initiated with a Complaint filed on June 7, 2011. On September 19, 2011, a Hearing Committee of the Professional Conduct Board conducted a hearing on the Idaho State Bar's Motion to Deem Admissions for Failure to Answer and for

Imposition of Sanction. Following that hearing, the Hearing Committee entered findings of fact, conclusions of law and a recommendation.

With respect to the first client matter, Mr. Miller represented plaintiffs, townhouse purchasers, whose units were subject to a building moratorium. The plaintiffs claimed that an engineer negligently prepared a plat that failed to indicate the units were located within a floodway. Mr. Miller falsely represented to his clients that he had sent a demand upon a title insurance company. In the case against the engineer, plaintiffs agreed to hire an expert and paid Mr. Miller money for the expert's retainer fee. Mr. Miller contracted to pay the expert directly but thereafter did not pay the expert's fees.

Mr. Miller also failed to timely disclose any experts and the defendant filed a motion for summary judgment arguing plaintiffs were unable to establish a *prima facie* case for professional negligence because they did not timely offer a qualified expert to testify about the standard of care. Mr. Miller did not advise his clients about the summary judgment motion, timely file a responsive brief, or submit any evidence by affidavit or depositions to contradict the factual assertions in the motion. The Court permitted plaintiffs an extension to file a responsive brief to the summary judgment motion, but denied plaintiffs from disclosing any expert witnesses, initiating formal discovery or filing affidavits or expert opinions in response to the motion. Eventually, the Court entered summary judgment against plaintiffs on all counts stating that, as a result of plaintiffs' own failure to provide affidavits from experts or any other witnesses, there was simply no viable cause of action available to plaintiffs.

Mr. Miller then misrepresented to his clients that the lack of expert witnesses had no bearing on the outcome of their case. Plaintiffs retained substitute counsel, who demanded that Mr. Miller immediately return over \$5,000 in payments made by plaintiffs to Mr. Miller for expert costs. Mr. Miller did not respond or return any of the requested payments for expert costs. In post-judgment motions, defendant was awarded over \$80,300 in attorney's fees and costs, jointly against plaintiffs and Mr. Miller. Substitute counsel filed a Motion for Reconsideration and was able to eventually settle the case in exchange for plaintiffs' payment of \$15,000 to defendant. The Disciplinary Order requires that before being eligible to be reinstated, Mr. Miller must pay the three plaintiffs in that case \$9,859.45, plus interest.

With respect to the second client matter, plaintiffs filed a complaint seeking an injunction and declaratory judgment regarding a roadway easement used to access property adjacent to defendants' property. Mr. Miller did not file an answer, even after obtaining an extension to file an answer from plaintiff's counsel, and default judgment was entered. Mr. Miller then filed a motion to set aside the default judgment, arguing that his family or health problems prevented him from filing responsive documents. At hearing, Mr. Miller indicated he was competent to continue in the case and agreed with the judge's suggestion that he provide his clients with a letter from his doctor confirming his capacity to proceed, and the default judgment was set aside. Mr. Miller then filed an answer and counterclaim. After that, an individual not named as a plaintiff ("LO") caused property damage to Mr. Miller's clients and he and his clients discussed naming LO individually as a defendant and seeking leave to amend the pleadings to allege punitive damages. Mr. Miller did not pursue either action.

Plaintiffs filed a motion for partial summary judgment. Mr. Miller did respond to the motion, but requested that the hearing and trial be continued because defendants wanted to depose LO. The Court denied the motion for continuance, took the motion for partial summary judgment under advisement, continued the trial and ordered Mr. Miller to comply with the pretrial orders by a date certain. Despite multiple assurances to his clients, Mr. Miller did not schedule depositions, name LO as a defendant or comply with the pretrial orders by the date required. His clients then retained substitute counsel.

Substitute counsel filed a motion for leave to file a responsive memorandum and objection to the partial summary judgment motion and plaintiffs filed a motion for sanctions. The judge granted both motions and imposed sanctions against Mr. Miller and his clients for attorney's fees and costs relating to two hearings. Substitute counsel requested his clients' file and return of funds they had paid for deposition and court reporter costs, which Mr. Miller never paid. Mr. Miller provided the file, but did not return any funds to his clients.

The judge eventually denied Mr. Miller's former clients' motion to amend the pleadings to include LO. The judge granted plaintiffs' summary judgment motion and found that an easement existed over Mr. Miller's former clients' property in favor of plaintiffs. Eventually substitute counsel was able to settle the case and settlement included plaintiffs' agreement to waive all payments of attorney's fees and costs that were ordered. The Disciplinary Order requires that before being eligible to be reinstated, Mr. Miller must pay those clients \$13,245.40, plus interest.

In the third client matter, the client retained Mr. Miller and paid him a \$500 fee to file and perfect mechanic's liens. Mr. Miller repeatedly assured his client that he would complete the lien work, however, no liens were filed and he stopped returning his client's telephone calls. Mr. Miller did not return original documents or any unearned fees to his client. The Disciplinary Order requires that before being eligible to be reinstated, Mr. Miller must pay this client \$500, plus interest.

Based upon the violations of the Idaho Rules of Professional Conduct discussed above, the Idaho Supreme Court suspended Mr. Miller from the practice of law in Idaho for five years. Before being eligible to be reinstated, Mr. Miller must also comply with I.B.C.R. 516 and 517, reimburse the Idaho State Bar for the costs associated with the proceedings, \$361.17, plus interest, pay the restitution to his clients referenced above, totaling \$23,604.85, plus interest, and reimburse the Client Assistance Fund for any monies paid by the Fund as a result of Mr. Miller's representation of any of his clients.

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