

BOSSE'S CASE: COURT REVIEWS THE RANGE OF FACTORS THAT GOVERN SANCTIONS IN A CASE OF LAWYER DECEIT

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In early April 2007, the New Hampshire Supreme Court issued its decision in Bosse's Case, No. LD-2006-009 (Apr. 4, 2007). The reported case can now be found at 920 A.2d 1203 (2007). In Bosse's Case, the Supreme Court continued its longstanding practice of utilizing the American Bar Association's Standards for Imposing Lawyer Sanctions (2005) ("ABA Standards") as a lodestar when determining the proper sanction in an attorney discipline matter. Although the New Hampshire Supreme Court has not adopted the ABA Standards formally, the Court relies on the Standards routinely as the analytic framework in the sanction-determination process. Bosse's Case also underscores the adverse professional consequences that inevitably flow from a lawyer's deceitful conduct - - even when the deceit is an isolated occurrence and occurs outside of the practice of law.

Factual Background:

The Respondent in Bosse's Case was self-employed as a real estate agent and an attorney. In February 2003, acting in his capacity as a real estate agent, Bosse mailed a solicitation letter to landowners on a small lake in Hillsboro. In his targeted mailing, Bosse offered to list the properties of the addressees and advised that he was working with three different builders and could "almost guarantee a quick sale" of each parcel of land for "at least \$10,000 [per lot]." One of the landowners, Raymond Grimard, contacted Bosse by telephone to express his interest. Bosse promised to send Grimard a listing packet and, if he could reach one of the builders, a purchase and sale agreement.

One day later, at the direction of one of the builders, Bosse prepared a \$10,000 offer to purchase Grimard's property and drafted a listing for the house the builder planned to construct on Grimard's property. Thereafter, although Grimard had not yet returned an executed copy of the exclusive listing agreement included within the listing packet, Bosse unilaterally entered the aforementioned listing into his office computer and uploaded the listing onto the Northern New England Real Estate Network (NNEREN), which is the internet-based multiple listing service for New Hampshire. The administrator of the NNEREN site requested that Bosse

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produce documents that would verify the listing. Bosse made repeated attempts to contact Grimard. When those attempts failed, he signed Grimard's name to the exclusive listing agreement and the purchase and sale agreement, returned the documents to NNEREN, and represented, without basis, that the purchase and sale agreement was "in effect." Shortly thereafter, Bosse learned that Grimard had listed his property with another realtor. Bosse wrote NNEREN stating, "I don't know what's going on. Grimard now says he listed with [another realtor] for twice as much and I have withdrawn my agreement & listing."

The Sanction Decision:

The Attorney Discipline Office ("ADO") and Bosse eventually stipulated that Bosse violated Rules 8.4(a) and (c). Under Rule 8.4(a), it is professional misconduct for an attorney to violate another rule. Rule 8.4(c) is violated where an attorney engages in conduct involving dishonesty, fraud, deceit, or misrepresentation. The stipulation based Bosse's violations of Rule 8.4(c) on his falsification of Grimard's signature and advice to NNEREN that the listing was "in effect." The ADO recommended disbarment; however, the PCC ordered a six-month suspension from the practice of law in New Hampshire. Following an unsuccessful motion for reconsideration, the ADO appealed to the New Hampshire Supreme Court.

Because the parties stipulated that Bosse violated Rules 8.4(a) and (c), the focus of the Supreme Court's decision was the determination of the appropriate sanction. The Court explained that "[a]lthough we have not adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (2005) ("Standards"), we look to them for guidance." Thus, the sanction analysis in Bosse's Case began with an application of the ABA Standards methodology. That approach requires consideration of: "(a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Standards § 3.0.

At the outset, the Court observed that absent mitigating circumstances, the ABA Standards provide that disbarment is generally proper when "a lawyer engages in any . . . intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Id. § 5.11. Bosse's conduct fell, at least potentially, within the ambit of this definition. However, as the Supreme Court applied the broader ABA Standards methodology and its own case law, several factors - - including the presence of various mitigating factors, the absence of a direct injury to a client or NNEREN, and the "isolated" nature of the misconduct - - combined to militate against application of the most severe sanction.

The Supreme Court explained, "[a]lthough we have ordered disbarment for attorney misconduct involving dishonesty, we have observed . . . that those cases involved additional and repeated misconduct, including the respondents' failure to cooperate with the professional conduct

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committee.” Following a review of several deceit/disbarment cases, the Supreme Court found Bosse’s Case was more akin to other “cases in which there has not been repeated deceit or dishonesty.” The Court noted, for example, that it has never disbarred an attorney for a single act of dishonesty,. The Court took care, however, to add that “there may be instances where a single episode of deceit is sufficiently egregious to warrant disbarment . . .” The Court also noted Bosse’s lack of a prior disciplinary record and his loss of his real estate license in related proceedings - - both significant arguments for moderation.

Ultimately, the Court rejected both the ADO’s recommendation of disbarment and the PCC’s sanction of a six month suspension:

Weighing the severity of the respondent’s misconduct, his dishonest or selfish motive and his years of experience (an aggravating factor) against his lack of a prior disciplinary record, his cooperation and remorse, and the loss of his real estate license, we conclude that respondent should be suspended from the practice of law for two years.
(Parenthetical added.)

Finally, it is worth emphasizing that while the parties stipulated, and the Court confirmed, that Bosse’s deceit did not occur in the course of client representation or in his “capacity as a lawyer,” this factor did not mitigate the sanction (or remove the conduct from the ambit of Rule 8.4(c)). Integrity is a core value of the profession - - and is expected regardless of the context in which the lawyer acts. Even isolated instances will result in severe professional sanctions.

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Bosse’s Case demonstrates that while attorney sanctions in New Hampshire remain rooted in the principles and standards of the ABA, the presumptive sanction generated by those guidelines will always be tested against a growing body of disciplinary case law before a final sanction is arrived at.

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