

ORIGINAL

FILED

11/20/2019

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: PR 18-0139

IN THE SUPREME COURT OF THE STATE OF MONTANA

PR 18-0139

IN THE MATTER OF BRIAN J. MILLER,

An Attorney at Law,

ORDER

Respondent.

On March 12, 2018, a formal disciplinary complaint was filed in this matter against Montana attorney Brian J. Miller. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

The Commission on Practice (Commission) held a hearing on the complaint on April 18 and 19, 2019. Both the Office of Disciplinary Counsel (ODC) and Miller, as represented by their respective counsel, presented argument and questioned witnesses.

On July 18, 2019, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Miller then filed objections, and the ODC filed a reply.

This Complaint arose from Miller's representation of Plaintiff Billie Redding in *Redding v. ProSight Specialty Management Company, Inc., et al.*, Cause No. CV 12-98-H-CCL, before Hon. Charles C. Lovell, Senior United States District Judge for the Helena Division of the United States District Court for the District of Montana. Redding had been previously represented by Montana attorney Linda Deola, a partner in the same firm as Miller. The underlying litigation began in State court, where Deola filed an amended complaint alleging that the defendant insurers acted in bad faith by failing to make a good-faith offer to settle Redding's claims against their insured. The defendants removed the litigation to the U.S. District Court.

On February 3, 2014, the U.S. District Court disqualified Deola from serving as trial or deposition counsel for Redding. Miller then entered the litigation, first as defense

counsel for Deola at her own deposition in the matter, and then as lead counsel for the litigation.

Both before and after Miller became involved in the case, the parties engaged in discovery disputes which required Judge Lovell's intervention. Miller also filed several unsuccessful motions, including a motion to recuse Judge Lovell. Judge Lovell ultimately granted summary judgment in the defendants' favor. Miller filed a notice of appeal and turned Redding's case over to new counsel, but no appeal was undertaken.

The ODC then filed a Complaint against Miller, alleging four counts of misconduct: (1) Miller attempted to "disrupt the summary judgment process" by filing a motion to recuse Judge Lovell shortly before a scheduled summary judgment hearing, and Miller had no authority to support the motion; (2) Miller frustrated the discovery process by failing to produce documents Deola was ordered to disclose; (3) Miller continued to pursue the bad faith lawsuit after Judge Lovell had found it frivolous; and (4) Miller failed to exercise independent professional judgment, but instead acted under Deola's direction.

After a two-day hearing, the Commission concluded Miller violated M. R. Pro. Cond. 3.1(a)(1), 3.1(a)(2), and 8.2(a) by moving to recuse Judge Lovell without a bona fide basis in law or fact, and by making arguments about Judge Lovell's qualifications and integrity with reckless disregard as to their truth or falsity. The Commission further concluded the ODC had failed to meet its burden of proof regarding the other counts of misconduct. The Commission has recommended discipline in the form of a public admonition and assessment of the costs of the proceedings.

Miller does not challenge any of the Commission's findings of fact. In his objections, Miller argues insufficient evidence supports the Commission's conclusions that he violated Rules 3.1(a)(1), 3.1(a)(2), and 8.2(a) by filing the motion to recuse Judge Lovell. He further argues that the Commission made several erroneous evidentiary rulings during the pendency of this matter. Finally, Miller contends that if this Court concludes sufficient evidence supports the Commission's conclusions, it should reject the recommendation that he be assessed the costs of the proceedings, because he alleges the ODC pursued several nonmeritorious counts that inflated the costs of the proceedings.

This Court reviews de novo the Commission’s findings of fact, conclusions of law, and recommendations. *In re Neuhardt*, 2014 MT 88, ¶ 16, 374 Mont. 379, 321 P.3d 833 (citation omitted). This duty includes weighing the evidence upon which the Commission’s findings rest. *In re Potts*, 2007 MT 81, ¶ 32, 336 Mont. 517, 158 P.3d 418. This Court reviews matters of trial administration for abuse of discretion. *In re Neuhardt*, ¶ 16.

In a disciplinary matter, the burden of proof lies with the ODC, which must prove its allegations by clear and convincing evidence. MRLDE 22(B)–(C). We have defined clear and convincing evidence as “a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof.” *Harding v. Savoy*, 2004 MT 280, ¶ 51, 323 Mont. 261, 100 P.3d 976 (citation omitted).

We have thoroughly reviewed the record in this matter. We disagree with Miller’s assertion that the Commission’s conclusion that he failed to have a bona fide basis in fact or law for asserting the grounds he relied upon in his motion to recuse Judge Lovell is inadequately supported by the Commission’s findings of fact. Among the evidence presented in this disciplinary proceeding is the motion and brief Miller filed, and these documents speak for themselves. As the Commission found, the arguments Miller advanced in support of the motion were without merit. Thus, the Commission’s conclusion that Miller violated Rules 3.1(a)(1) and (2) is correct.

As to the Commission’s conclusion that Miller violated Rule 8.2(a) by asserting Judge Lovell altered testimony and created affirmative defenses for the defendants with reckless disregard as to the truth or falsity concerning the qualifications or integrity of Judge Lovell, Miller maintains that under Montana case law, the ODC would have to prove actual malice in order to sustain this charge and that it failed to do so. Miller relies on *Sible v. Lee Enterprises, Inc.*, 224 Mont. 163, 729 P.2d 1271 (1986), in which this Court applied the “malice” standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) to a defamation suit, defining something “published with malice” as published “with knowledge that it was false, or with a reckless disregard of the truth.” Miller further notes

that § 27-1-221, MCA, pertaining to punitive damages awards, describes “actual malice” in part as “knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff.”

However, the interests protected by professional discipline are different from those protected by defamation law. As explained in *United States District Court v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993), the standard to be applied regarding Rule 8.2(a) is not the subjective standard of *New York Times*, but is rather an objective standard: what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. *See also In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979) (“Defamation is a wrong directed against an individual Professional misconduct . . . is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.”). The ODC thus argues Miller uses the incorrect standard and this Court should define “reckless disregard” in the context of attorney discipline as it has been defined by the majority of jurisdictions. Ellen J. Bennett and Helen W. Gunnarsson, *Annotated Model Rules of Professional Conduct*, 688-91 (9th ed. 2019).

Applying the objective standard in the present case, and having thoroughly reviewed the record, we conclude clear and convincing evidence supports the Commission’s conclusion that Miller violated Rule 8.2(a) by asserting Judge Lovell altered testimony and created affirmative defenses for the defendants with reckless disregard as to the truth or falsity concerning the qualifications or integrity of Judge Lovell.

In addition to his objections to these conclusions of law, Miller also challenges several evidentiary rulings the Commission made during the pendency of this matter. He divides these challenges into two assignments of error: that the Commission abused its discretion (1) by admitting documents by judicial notice, over objection, without following the requirements of M. R. Evid. 201; and (2) by erroneously admitting briefs filed by the defendants in the underlying litigation.

Miller argues that under Rule 201 the Commission must enumerate every fact of which it has taken judicial notice. The ODC responds that Miller’s argument should be

disregarded because it moved the Commission to take judicial notice under Rule 202, which provides for judicial notice of law, and not Rule 201, which provides for judicial notice of facts. However, we have reviewed ODC's Request for Judicial Notice, filed before the Commission on February 28, 2019, which explicitly asks the Commission to take judicial notice pursuant to both Rules 201 and 202.

The ODC's argument thus lacks merit. However, we are also not persuaded by Miller's argument, which he also raised before the Commission. While Miller argues that some of these exhibits—specifically Judge Lovell's orders found in Exhibits 19, 29, 34, 43, 44, 54, 59, and 60—"contain facts that, if accepted by judicial notice, bypass ODC's burden to prove its case," the Commission's Order on Pending Motions, in which it took judicial notice of these orders, set forth the parameters for use of the contents of these orders as evidence in the disciplinary matter. As explained by the Commission, it recognized that Judge Lovell's orders could not be used as *prima facie* evidence, and that the orders were not determinative of the alleged rule violations. As explained by this Court in *In the Matter of Genet McCann*, No. PR 16-0635, Or. (June 6, 2018), the Commission may take judicial notice of orders filed in court proceedings, but may not accept the orders, which incorporate a lesser burden of proof, as *prima facie* evidence of a rule violation. In this instance, the Commission determined to take judicial notice of those orders it found relevant insofar as it would "take judicial notice of the fact that [these orders] were filed and were a part of the underlying federal court proceedings. The Commission will further take judicial notice that the Orders . . . do not constitute *prima facie* evidence of facts or a rule violation." The Commission further ruled that none of the documents for which the ODC requested judicial notice would be "determinative of any fact or legal issue in this disciplinary matter."

The Commission carefully and correctly applied this Court's standard for judicial notice of filings in court proceedings in this instance. Moreover, Miller has not challenged any of the Commission's findings and alleges no instance of the Commission improperly relying on a fact or law from Judge Lovell's Orders within its Findings of Fact, Conclusions of Law, and Recommendation.

As to Miller’s argument that the Commission improperly admitted certain briefs filed by the defendants in the underlying action—specifically Exhibits 24, 27, 33, 37, 40, and 48—even assuming *arguendo* these exhibits were improperly admitted, Miller has shown no prejudice, nor does it appear the Commission relied upon these exhibits in concluding that Miller violated Rules 3.1(a)(1) and (2) and Rule 8.2(a). Therefore, any error was harmless.

Finally, Miller argues this Court should not impose the costs of the proceedings upon him. Under MRLDE 9(A)(8), this Court may assess the cost of proceedings as part of the imposed discipline. MRLDE 9(B) provides factors to consider in determining the discipline, including MRLDE 9(B)(4), the existence of aggravating or mitigating factors. Among other arguments, Miller asserts this Court should consider as a mitigating factor that he “was forced into an expensive and time consuming two-day formal hearing, with over 100 ODC-proposed exhibits with thousands of pages of documents, to defend against a plethora of allegations, many of which the Commission determined lacked any merit.” He further points out that less than half of the ODC’s proposed exhibits were admitted into evidence. Miller claims the issue of his motion for recusal could have been dealt with in a short, contested hearing rather than a two-day proceeding with numerous witnesses and voluminous exhibits.

The ODC argues this Court should uphold the recommendation for costs because “assessment of costs is routine in disciplinary cases regardless of whatever other forms of discipline are imposed.” The ODC further argues it is irrelevant whether Miller prevailed on the majority of the charges because assessment of costs is a form of discipline and not subject to a “prevailing party” analysis. *In re Sisler*, No. 98-484, Or. (Jan. 17, 2001).

However, the basis of Miller’s argument is not that he was the prevailing party on certain charges, but rather that the ODC caused the Commission, the ODC, and Miller to expend resources needlessly by pursuing numerous charges which it failed to support. In its conclusions of law, the Commission ruled the ODC failed to meet its burden of proof regarding most of the charges, and noted it failed to present any credible evidence to establish its fourth count of misconduct. Our review of the record, and particularly of the

hearing transcript, leads us to conclude the ODC was unprepared to present evidence to meet its burden of proof in some instances, and its protracted questioning of witnesses was not focused on proving the counts of misconduct in this case. The manner in which the ODC pursued this case is a factor that mitigates against sanctioning Miller with the costs of the proceedings. Furthermore, we are unpersuaded by the ODC's position that we should routinely assess costs regardless of the circumstances.

Based upon the foregoing,

IT IS HEREBY ORDERED:

1. The Commission's Findings of Fact, and Conclusions of Law, are ACCEPTED and ADOPTED.

2. The Commission's Recommendation for Discipline is ACCEPTED IN PART and REJECTED IN PART.

3. Brian J. Miller shall receive a public admonition from the Commission. As determined by the Commission, that admonition shall be either in writing or by personal appearance in front of the Commission at a date, time, and place to be set by the Commission.

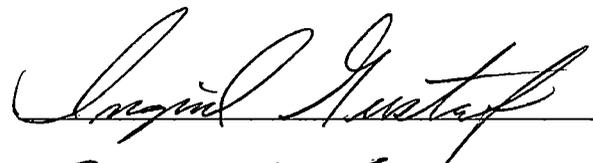
4. Brian J. Miller is not assessed the costs of these proceedings.

The Clerk of this Court is directed to serve a copy of this Order of Discipline upon counsel for Brian J. Miller, Disciplinary Counsel, and the Office Administrator for the Commission on Practice.

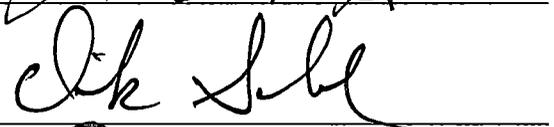
DATED this 19th day of November, 2019.



Chief Justice





Justices

Justice Beth Baker took no part in the consideration of this matter.