

Summary of SC88961, *In re: Nathan J. Forck*

Original disciplinary proceeding

Argued and submitted November 6, 2013; opinion issued February 4, 2014

Attorneys: The chief disciplinary counsel's office was represented by Chief Disciplinary Counsel Alan D. Pratzel and Sam S. Phillips and Carl E. Schaeperkoetter of the counsel's office in Jefferson City, (573) 635-7400; and Forck was represented by Lori J. Levine and Jason H. Ludwig of Carson & Coil PC in Jefferson City, (573) 636-2177.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: An attorney already on probation for alcohol-related issues and the chief disciplinary counsel jointly ask the Supreme Court of Missouri to extend the attorney's probation and impose additional conditions for violating rules of professional conduct in representing three clients. In a 4-3 opinion written by Judge George W. Draper III, the Court finds the attorney violated certain rules of professional conduct and orders that the attorney remain on probation for two years under additional conditions imposed and that the stay of the probation remains in effect.

Judge Zel M. Fischer dissents. The new ethical violations are significant in nature and violate the terms of the attorney's probation. They should not be analyzed as if they were part of a new disciplinary case. Rather, the Court should revoke probation and impose the suspension.

Facts: Because of concerns with prior excessive alcohol use, Nathan Forck was admitted to practice law in Missouri in April 2006 pursuant to a monitoring agreement requiring him to abstain from alcohol and verify that he regularly was attending a support or therapy group. He began working for an attorney with a large elder law and estate planning practice. Following a May 2007 alcohol-related altercation at a bar, Forck was arrested for assault, though the charges later were dropped. Because of his alcohol use, failure to verify his attendance at support group meetings and failure to notify the chief disciplinary counsel of his arrest, the chief disciplinary counsel charged Forck with violating rules of professional conduct. In a joint stipulation, the chief disciplinary counsel recommended that this Court suspend Forck's license to practice law with no leave to apply for reinstatement for at least six months, stay the suspension and place Forck on probation for two years. This Court accepted the recommendation in December 2007. Forck left the elder law practice and, for about 18 months, worked in a general practice with another attorney. In early 2009, the elder law attorney contacted Forck about taking over his practice. Forck agreed to do so and agreed to retain the attorney's support staff. Although Forck did not have personal expertise in elder law or Medicaid litigation at the time, relying instead on knowledge he gained from the attorney and the support staff, Forck promoted himself and the firm as experienced in elder law. In 2010, Forck twice asked this Court to release him from probation. Each time, the Court overruled his motion after being advised that the chief disciplinary counsel was investigating complaints against Forck. The parties stipulate that Forck committed five violations in his representation of three clients. Forck and the chief disciplinary counsel jointly ask this Court to extend Forck's probation for one year and to impose additional terms and conditions beyond those ordered in 2007.

DISCIPLINE ORDERED.

Court en banc holds: Forck's conduct, which can be remedied by education and is unlikely to reoccur, warrants an extended term of probation. Forck admits he violated Rule 4-1.1 (competence) and Rule 4-1.5 (fees) in representing certain clients. In the joint stipulation, the parties suggest that application of the applicable standards of the American Bar Association (ABA) and this Court's rules justify continuing Forck's probation because the circumstances and factors connected with his earlier issues have changed. The record contains evidence of both aggravating and mitigating circumstances.

Forck's misconduct arose out of negligence instead of intent to violate the rules and take advantage of his clients. While he knowingly promoted himself and his firm as having expertise in elder law, estate planning and Medicaid litigation, he did so on the misguided, unprofessional practices of the attorney whose practice he took over and the support staff he retained. Forck admits he naively relied on these persons due to their extensive experience in the elder law field. When he learned of the complaints against him, he discharged the support staff and now completes all the legal work himself. Further, all three requirements of Rule 5.225(a)(2)(A-C) to make an attorney eligible for probation have been demonstrated here. He has not committed any misconduct warranting disbarment. It is unlikely he will harm the public during his extended probationary period, as he has maintained his sobriety since 2007 and has undertaken steps to improve his practice. His new relationship with a mentor who is a well-respected elder law attorney and who has agreed to monitor and supervise Forck personally and professionally, his attendance at professional education classes, and reporting requirements will remedy the prior misconduct and permit Forck to perform legal services and practice law in the future without causing the courts or profession to fall into disrepute.

This Court applies progressive discipline when sanctioning attorneys who commit misconduct. While Forck already has received the benefit of an extended probationary period, and the Court could impose the stayed suspension, the chief disciplinary counsel's recommendation to extend the terms of probation, adding conditions, does impose additional sanctions on Forck and is permitted by the guidelines to the ABA standards and Rule 5.225(f)(2). Moreover, allowing Forck to remain on probation provides him an opportunity to receive additional education, monitoring and support that will improve his law practice and better serve and protect his clients in the future and enables him to make full restitution payments to his harmed clients.

Dissenting opinion by Judge Fischer: In light of the significant nature of the new violations, the author would revoke Forck's probation and impose the previously ordered suspension. At no time since his admission six years ago has Forck practiced law without being subject to supervision, and he has demonstrated that allowing him the privilege of continuing to practice law is not worth the risk to the public or the reputation of the legal profession. After he filed his first motion for release from probation, he was advised he was under investigation for additional violations of professional conduct, and yet he failed to comply with the investigation and then filed a second motion for an order of successful completion of probation. At the conclusion of the investigation, he stipulated he committed five new, separate rule violations that caused harm to his clients. Each of these new ethical violations to which Forck admits is a violation of his probation, which required him to abide by the rules of professional conduct. Forck stipulated that his conduct while on probation harmed his clients to the extent that he agreed to pay \$22,000 in restitution. Forck's actions demonstrate he is no longer eligible for the probation imposed for his 2007 conduct. Accordingly, this Court should revoke probation and impose the originally ordered discipline.