

Court Penalizes Attorney for Faulty Case Citation and Failure to Address Adverse Authority

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By Francis G.X. Pileggi, Esquire



An attorney was fined in a recent Delaware opinion for misrepresenting what a key case stood for, as well as failing to address adverse opinions in response to a motion for summary judgment. While the attorney contended that his misstatement and lack of reference to opposing authority were good faith mistakes and due to unawareness of adverse rulings, the trial court felt these missteps were not only unacceptable, but tainted the fairness and efficiency of the court. *In re Asbestos Litigation*, C.A. No. 09C-11-059 ASB (Del. Super. Ct. Oct. 28, 2011). As of this writing, the case is pending on appeal before the Delaware Supreme Court.

Delaware Rule of Professional Conduct 3.3(a)(1) states that a lawyer must not knowingly make a false statement of material fact or law, and while this cannot be violated through mere negligence; reckless conduct may satisfy the rule's knowledge requirement. The standard may include turning a blind eye to the obvious, ignoring what there is a duty to see, or declaring as fact something an attorney knows nothing about. *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (Pa. 1999). While there are good faith mistakes, lawyers must not file briefs or pleadings that contain allegations or statements that they know to be false, or misrepresent material facts or law. *In re Kalal*, 643 N.W.2d 466, 468-74 (Wis. 2002). A lawyer who deliberately misleads a court violates Rule 3.3(a)(1) even if the statement is literally true and therefore not "false." *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129, 145 (Tex. App. 2000).

Everyone makes mistakes. The issue in this context is how to determine which mistakes should be penalized. The Delaware case of *In re Asbestos Litigation* involved a response to a summary judgment motion in which the plaintiff's counsel asserted that the court had previously denied (in another case) the same defendant's motion for summary judgment on weaker facts than were being presented, and cited to a case. However the case counsel cited was the wrong case, and had in fact, been settled prior to an argument on the motion. After the court became aware that the citation was to the wrong case, the court issued an Order to Show Cause as to why the falsity of the statement did not warrant sanctions under Superior Court Civil Rule 11(b). In counsel's response to the court's Order to Show Cause, counsel admitted the error but contended that sanctions were not appropriate because the mistakes were made in good faith and the case that was accidentally cited to "seemed to be the most likely case." *In re Asbestos Litigation*, C.A. No. 09C-11-059 ASB at 4. In a second response issued two days later, counsel identified the correct case, and due to the similarities in the cases, argued that sanctions were not appropriate because a Rule 11 violation is determined by a subjective good faith test; and he pleaded, misstatements committed in subjective good faith are not enough to satisfy a Rule 11 violation. See generally *Policemen's Annuity and Benefit Fund v. DV Realty Advisors LLC*, C.A. No. 7204-VCN (Del. Ch. Aug. 16, 2012) (comparing common law definition of good faith in fiduciary duty context and contract law context).

The court in the case of *In re Asbestos Litigation* reasoned that even when an attorney subsequently corrects an errant pleading, the submission of inaccurate and unverified authorities initially, expecting that the court would rely on them, was unacceptable, and identifying the correct case subsequently does not cleanse the sin. The court emphasized that the ease with which counsel found the correct cite strengthened the court's suspicions that no real attempt to ensure the accuracy of the original citation was made. *Id.* at 5. The court further explained that in this situation counsel failed to conduct thorough research. Counsel claimed that a good faith test is required, but the court noted that current Delaware law looks to the reasonableness under the circumstances in determining whether an attorney's actions warrant sanctions. *Id.* at 4. The court held that once Rule 11 violations have been committed, a penalty should follow. *Id.* at 5.

The court also focused on counsel's failure to cite and address adverse legal authorities. Three adverse cases were cited in the defendant's motion for summary judgment, and plaintiff's counsel was presented with copies of those decisions. But in the opposition briefs of the plaintiff's counsel (the one who was fined), none of the cases was referenced. *Id.* Initially, plaintiff's counsel responded that he was unaware of the three prior decisions, which the court found to be unreasonable since they had been cited in the motion for summary judgment, copies were attached to the motion, the plaintiff's counsel's firm was the counsel of record, and in the response, counsel for the plaintiff noted that he was aware of the court's prior decisions. *Id.* In an alternative argument, plaintiff's counsel contends that the cases are not controlling law and therefore there was no obligation to disclose them, but the court was not convinced. The court ruled that the three cases needed to be presented at least in order to distinguish them from the case plaintiff's

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counsel presented, and that by ignoring those decisions, counsel violated his professional responsibility. *Id.* The court held that the plaintiff's attorney's decision not to address adverse rulings was an intentional act to mislead the court. The court underscored its view that a critical duty of an attorney is to distinguish adverse authority, and ignoring that duty "fits precisely into the language of Rule 11(b)(2) and demonstrates exactly why the Rule exists." *Id.* at 8. Although this decision is the subject of a pending appeal, it serves as a cautionary tale for those submitting written legal arguments to Delaware courts.

Francis G.X. Pileggi is the Member-in-Charge of the Wilmington, Delaware, office of Eckert Seamans Cherin & Mellott, LLC. He summarizes the corporate and commercial decisions of Delaware Courts and provides commentaries on legal ethics at www.delawarelitigation.com. He is a Master of the Bench in the Richard K. Herrmann Technology AIC in Wilmington, Delaware.

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1229 King Street, Second Floor, Alexandria, VA 22314 | Phone: (703) 684-3590 | Fax: (703) 684-3607 | info@innsocourt.org

