

PROFESSIONAL LIABILITY UPDATE

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***In the Matter of Joshua M. Dale*** (2005) WL 1389226

*The California State Bar Court holds that an attorney who influenced an incarcerated witness represented by other counsel to confess to the commission of a crime breached his fiduciary duty and committed acts of moral turpitude.*

Darryl Geyer, a 22 year-old man with a tenth grade education confessed to police that he started a fatal fire in an apartment building. He later pled guilty to six counts of arson and was found guilty of one count of second-degree murder. The plea agreement allowed Geyer to appeal his conviction on the homicide count. Joshua Dale represented several tenants in their civil suit against the owner. Dale asked Geyer's criminal attorney for permission to interview Geyer, but was denied access.

Dale nevertheless visited Geyer in custody by availing himself of procedures reserved for attorneys. During these visits Dale asked Geyer to execute a declaration regarding what he observed and did in the apartment building on the night of the fire. When Geyer resisted Dale befriended Geyer, undermined Geyer's relationship with his criminal attorney, and urged him to admit to the crime by promising that he and his clients would testify on his

behalf at the parole board. Geyer fired his criminal defense attorney and Dale presented Geyer with a contract, promising to represent Geyer and assist him at a parole board hearing. Dale assured Geyer that the declaration he sought would not harm Geyer's appeal. He did not tell Geyer that if the appeal were successful, the declaration could be used against him at a re-trial. Geyer executed a declaration admitting he started the fire.

After obtaining Geyer's declaration, Dale had no further contact with Geyer. Dale settled the civil suit for \$400,000. Geyer lost his appeal, although the declaration was not the cause.

Dale did not violate Rule of Professional Conduct 2-100, which precludes an attorney from communicating directly or indirectly with a represented party, because Geyer was a witness, not a party to the civil case.

Nevertheless, Dale committed acts of moral turpitude in violation of Business and Professions Code § 6106 and breached a fiduciary duty owed to Geyer pursuant to Business and Professions Code Section 6068(a).

party to act contrary to his or her best interests.

The State Bar Court found Dale's overreaching "the height of irresponsibility." Dale's omission of the crucial information that the declaration could affect a re-trial in Geyer's case as well as his efforts to drive a wedge between Geyer and his attorney to gain an advantage in civil litigation was at best grossly negligent and rendered Dale culpable of moral turpitude.

The State Bar Court rejected Dale's assertion that Geyer was not his client. Dale led Geyer, a 22 year-old incarcerated man with a tenth grade education, to think he was his attorney by signing each letter "Joshua A. Dale, Esq" and marking each letter "confidential legal correspondence." Dale provided Geyer with legal advice and ultimately succeeded in causing Geyer to believe that he, and not Geyer's criminal attorney, had Geyer's best interests at heart. Because Dale used his superior position as an attorney to gain Geyer's trust, he was found to have owed and breached a fiduciary duty to him.

*Comment.* Dale demonstrates that although attorneys should zealously represent their clients, they must never lose sight of their ethical obligations when communicating with third parties. While contact with third party witnesses usually does not result in the imposition of fiduciary duties, attorneys should not lead a third party to believe the attorney represents the third party's interests or use their attorney status to induce a third

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