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What duties does a lawyer owe?

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Two of the fundamental duties owed by a lawyer to their clients are to secure their funds and to keep their communications confidential.

In two recent cases, an oral argument before the 2nd District Appellate Court in *Khoury v. Niew* and a trial court decision by Will County Circuit Judge John C. Anderson after a bench trial in *Ritter v. Rambo*, it was at issue whether there was adherence to and what is the source and scope of those duties. Much can be gleaned from these circumstances to prevent similar problems for other lawyers and their clients.

In *Khoury*, a firm comprised of a married couple who both had prior disciplinary actions taken against them, a claim was brought against Stanley Niew personally for breach of fiduciary duty for an alleged fraud, unknown to him, that was committed by his wife of client funds funneled through the client trust fund. The trial court found that though he did not personally have a relationship with the client whose funds were allegedly stolen, he nonetheless owed them a fiduciary duty as the president of the firm and that in failing to have adequate controls over the trust account, he was personally liable. The trial court imposed this duty based upon numerous factors, including the relationship between the lawyers in the firm, the prior disciplinary history of the subordinate attorney, and Rule 5.1 of the Rules of Professional Conduct.

At oral argument, counsel for the appellant argued that to impose such a duty would have sweeping implications for law firm practice, especially in small firms that do not have the resources of larger firms that have robust controls in place on client trust accounts. Counsel asserted that Niew reviewed the accounts each month with the bookkeeper, but that the alleged fraud was concealed by the conduct of his wife.

As to Rule 5.1, counsel urged the longstanding proposition that the Rules of Professional Conduct do not create a duty themselves and that, even if it did, Section (c) requires affirmative knowledge or conduct of the supervising lawyer to be charged with misconduct, as it states "(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

There was no allegation that Niew had knowledge of, ordered, or ratified the conduct. Should the judgment stand, and even if it does not, the tightening of trust account controls can already be heard.

In *Ritter*, which deals with a number of issues of first (or, to quote the court, "almost") impression in Illinois, the trial court heard a case in which a lawyer representing a client in a real estate transaction had his email account hacked. After first receiving an email with wire instructions from counsel for the bank with a warning about fraudulent scams, several days later the client received emails from her real estate agent, whose

email address had been spoofed, with wire instructions. When she emailed her lawyer to confirm the wire instructions, she received an email response from this account, described by the trial court was "a little wonky in terms of punctuation and sentence structure," confirming the propriety of the instructions. In fact, that email was sent from the lawyer's hacked email account by the scammers. The client then tried to call the lawyer but was unable to reach him because he was on vacation. Despite the warning signs and concerns expressed by her bank about the wire instructions, the client wired the money, which was never recovered.

The client filed suit against the lawyer for legal malpractice in failing to properly secure their communications. The plaintiff pointed to Rule 1.6(e) which states "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Citing the Preamble of the Rules, the court held that the rule does not create the standard of care and, in the absence of an expert lawyer to offer testimony on the standard of care and that the defendant-lawyer breached it, the plaintiff's claims failed. Going beyond the threshold finding in favor of the defendant-lawyer that the plaintiff failed to meet her burden, and assuming a duty was imposed by Rule 1.6(e), the court criticized the defendant-lawyer for not changing his password with sufficient frequency, which allowed the hack to happen.

The court also addressed the issue of causation and held that in the context of legal malpractice, the background principal of pure comparative fault established in *Alvis v. Ribar*, 85 Ill.2d 1 (1981), applied because this case involved legal malpractice and alleged economic loss. The court, sitting as the trier of fact, held that in this circumstance 735 ILCS 5/2-1116 did not apply. Given that, and based upon the testimony, the court found that the plaintiff was 80% at fault for the damages she claimed and that the lawyer was 20% at fault.

Lessons can be gleaned from these situations and lawyers at all stages of their careers and responsibility within their firms should pay heed to the ultimate outcome of these decisions to help guide their practices in these areas.
