

# LAW WEEK

## COLORADO

# Appeals Court: Ethics Violation Bars Enforcing Verbal Contract

*Attorney said legal team spent 'hundreds of hours' on pro bono case that lays down new case law*

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In what opposing counsel called a “very unusual” move, a disbarred attorney’s appeal may lay the groundwork for a new rule of law barring enforcement of contracts if an ethics rule is violated.

On April 21, the Colorado Court of Appeals ruled against David Calvert, a former attorney based in Greenwood Village who lost his license in 2011 after a disciplinary judge found his “dishonesty” and ethical infractions struck “at the heart of our system of justice.” Calvert asked the appeals court to reverse a summary judgment in favor of a former client, Diane Mayberry, and her daughter, Desiree, when he tried to cash in on a verbal contract.

“It’s a big significance to all lawyers and clients in Colorado,” said Chris Forrest, a partner at Miller & Steiert in Littleton who along with partner Gary Clextan represented Desiree Mayberry. “It was really important to argue in front of the Court of Appeals to adopt a brightline rule: if attorneys enter into a business transaction with a client, they do it at their own risk. They not only risk of disbarment or discipline, they now have risk of voiding the business transaction and not gaining anything from it.”

Eric James, a solo practitioner in Fort Collins, represented Diana Mayberry. Anne Whalen Gill from Cox Baker & Page in Castle Rock represented Calvert.

With a certiorari petition due June 2, Forrest said the issue could land before the Colorado Supreme Court in the next session.

“I think there is some significant chance the Supreme Court could take review of this case since it is a novel question and an issue of public policy,” Forrest said.

Calvert was disbarred in 2009 after the hearing board considering his case found several violations in his dealings with previous clients, including a finding that he attempted to secure interest in loans to Mayberry in excess of \$100,000 by recording a false deed of trust on her home in another client’s name without permission or consent. The hearing board called Mayberry “the epitome of a vulnerable victim” because of mental illness and drug dependency.

The appeals court also remanded to the trial court to decide whether Calvert initiated the appeal “for the sole purpose of harassing the former client and her daughter or of delaying the resolution of these proceedings.”



Because the appeals court cannot engage in factfinding like a trial court during a jury trial, the appeals panel ordered the lower court to award reasonable attorney fees to the Mayberrys if they find he was harassing the family.

In Mayberry’s case, Calvert violated Colorado Rule of Professional Conduct 1.8(a), which prohibits a lawyer from entering into a business transaction with a client “or knowingly acquir(ing) an ownership, possessory, security or other pecuniary interest adverse to a client.” While the sanctions and reasons for disbarment are well established, Calvert ripped open a legal question not yet settled in Colorado when he attempted to recoup his money with the lawsuit, claiming Mayberry violated an oral contract to repay him with security interest in her home.

“I think one of the reasons it has not come before this court, most lawyers who have serious ethical violations don’t then turn around and sue to recoup from the very actions that led to disbarment,” Forrest said. “It’s very

unusual, from a procedural standpoint, see a lawyer do something like this.”

In finding that an ethical violation can preclude an attorney from enforcing a business arrangement in violation of Rule 1.8(a), Judge Steve Bernard wrote for a unanimous appeals panel that that the provision had a policy component, a legal standard that requires a design to serve the public rather than the interests of an attorney.

“The obvious purpose of Rule 1.8(a) is to protect the interests of clients, who are clearly part of the public, and not the interests of lawyers,” Bernard wrote. “Comment 1 to this rule states that a ‘lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client’ can work together to ‘create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client.’”

“Rule 1.8(a) does not concern itself with merely technical matters,” Bernard wrote.

“Rather, it aims to avoid the sorts of fundamental conflicts of interest that can grievously harm clients.”

Although an answer to a novel legal question in Colorado, courts in other states have come to similar conclusions finding contracts are automatically void if based on a violation of a rule that implicates public policy, although the standards vary. A contract may continue in Washington despite an ethical violation but in California, it merits a mandatory prohibition on contract enforcement.

“We felt that it was important because of our ethical duties as lawyers and provided pro bono services because of the way the Mayberry family had been victimized by Mr. Calvert,” Forrest said. “As lawyers, we like to consider ourselves to be highly ethical, and we don’t like the stain on the practice something like this creates. We wanted to send a message to pro bono clients that there are lawyers out there who won’t stand for this and will donate their time to correct it.” •

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