

No. 30631- *Michele M. Beto v. Daniel H. Stewart, M.D.*

FILED

July 2, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

McGraw, Justice, dissenting:

As indicated by the deposition testimony of Dr. Stewart, defense counsel had knowledge, as early as January of 2000, that Dr. Stewart had written to The Doctor's Company in regards to Ms. Beto's injury due to the lack of additional padding during the procedure. According to Dr. Stewart's sworn testimony, defense counsel knew of the documents' existence by May 19, 2000. However, defense counsel did not disclose that the documents existed until September 5, 2000. By not disclosing this information, defense counsel failed to comply with discovery requests for almost four months. Moreover, during the time that defense counsel did not disclose the documents, he led Ms. Beto to believe that they may have been destroyed. Then, after the fact, defense counsel attempted to assert the work product doctrine as the reason for withholding the documents. The record suggests that they knew they were doing something wrong, and they were trying to gloss over their actions.

An attorney should zealously advocate a client's position, but must do so in accordance with our Rules of Professional Conduct. While the attorney must represent the client, that representation should not rise to the level of covering up information. If an attorney does so, then he or she goes beyond the boundaries of advocacy. In addition, according to West Virginia Rule of Professional Conduct 3.4(d), [a] lawyer shall not ... fail

to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party....” By not complying with the discovery requests and failing to promptly provide the letters, defense counsel went beyond the boundaries of advocacy.

The majority misses the mark when indicating that there was no harm to Ms. Beto. “[A]ttorney disciplinary proceedings are primarily designed to protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice....” *Committee on Legal Ethics of the West Virginia State Bar v. Keenan* 192 W.Va. 90, 94, 450 S.E.2d 787, 791 (1994). Defense counsel’s conduct is the very kind of conduct that gives rise the public view that lawyers are dishonest and leaves a black mark on our noble profession.

Because I believe that the actions of defense counsel were sanctionable, I must respectfully dissent.