

BEFORE THE ALASKA BAR ASSOCIATION  
FEE REVIEW COMMITTEE  
THIRD JUDICIAL DISTRICT



David S. Haeg, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 Brent R. Cole, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

File No. 2006F007

Decision and Award

On March 29, 2004, David Haeg learned that he was the subject of a criminal investigation when a search warrant was served on a hunting lodge that he owned. It developed that the Alaska State Troopers were investigating him for taking wolves "same day airborne" outside an area where aerial wolf control activities were permitted.

Mr. Haeg hired attorney Brent Cole to represent him. He signed a written fee agreement on April 10, 2004 that included the customary stipulation that the attorney could not guarantee any particular outcome for the client. The agreement provided that Mr. Cole would bill for legal services at the rate of \$200 per hour. Mr. Cole undertook the representation and sent Mr. Haeg detailed billing statements on April 21, June 1, June 29, July 26, August 30, October 7, October 29, November 8, November 30, 2004 and January 31, 2005. Mr. Cole charged a total of \$13,389.00 and Mr. Haeg paid \$11,329.81.

Mr. Haeg does not dispute the reasonableness of the hourly rate set by Brent Cole or the amount of time charged for legal services. Rather, Mr. Haeg's complaint is that Mr. Cole's services to him had so little value that he should be excused from paying a fee.

Mr. Haeg has identified three specific failures: 1) Mr. Cole should have filed a motion to suppress the evidence seized pursuant to the search warrants because the affidavit submitted to the court in support of the search warrant application was perjured; 2) Mr. Cole

gave him poor advice when he recommended that Mr. Haeg give a statement to the Alaska State Troopers without first having reached a binding plea agreement; and 3) Mr. Cole should have moved for specific performance of a plea agreement when the prosecutor unilaterally changed its terms.

Mr. Haeg did not offer evidence of the points on which the search warrant application was defective. He argued that the affidavit contained a false statement about the location of the taking of the wolves, although the taking would have been unlawful even in a correctly-identified location. We are therefore unable to reach a conclusion that the affidavit was false in whole or in part or that the misstatement was material. It follows that the panel cannot decide whether a motion to suppress should have been filed or was likely to have been granted.

Mr. Cole testified that it was his opinion, from the earliest stage of the case, that the best case strategy for Mr. Haeg was "damage control". His reasoning was that there was sufficient evidence to support a conviction on one or more counts, and a defense at trial would be unavailing. It followed that steps should be taken to get the best possible plea agreement. Mr. Cole believed that early cooperation with the authorities would lay the groundwork for a successful negotiation, and, based upon Mr. Cole's advice, Mr. Haeg did volunteer a statement about the offenses to the troopers.

The prosecutor sent Mr. Cole a proposal for a plea and sentencing agreement on August 18, 2004. In the ensuing weeks, the prosecutor and Mr. Cole negotiated adjustments in some of its terms. By October, a plea agreement had been firmed up. Central to Mr. Haeg's concerns was the suspension of his hunting guide license which, the agreement provided, would be for one to three years, the exact term to be set by the court at sentencing. All other terms of the sentence were fixed, including the forfeiture of a PA-12 aircraft. The prosecutor proposed to argue that the license suspension should be at the high end of the agreed-upon range because he had evidence that Mr. Haeg had participated in hunting or guiding violations in connection with a moose hunt the previous year; the defense had prepared evidence to refute the prosecutor's theory and anticipated as much as a day of testimony at the time of sentencing. If Mr. Haeg showed that he was not guilty of the moose violations, he would be in a better position to argue that the license suspension should be as short as one year. The entry of plea and imposition of sentence were set for November 9, 2004.

During the weeks that Mr. Cole was negotiating with the state, Mr. Haeg had second thoughts about the forfeiture of the aircraft, which he thought particularly suited to his work as a game guide. He had another plane that he could more easily give up, but the prosecutor had not agreed to allow a "swap". There had also been some discussion of Mr. Haeg's paying some amount of cash in lieu of forfeiture of the aircraft. Mr. Haeg conceived the idea that he could plead guilty to the charges and then allow the judge to decide the terms of the sentence, including jail time, fines, forfeitures, license revocation and the length and terms of probation. It was his hope to persuade the judge to return the plane to him.

Brent Cole vehemently opposed Mr. Haeg's "open sentencing" idea. He was concerned about the application of A.S. 08.54.605, which effectively requires a five-year suspension of a guide license when a guide is sentenced to more than five days or more than \$1000 on a hunting violation. He thought it likely that a judge would exceed the five-day or \$1000 threshold at open sentencing with the result that Mr. Haeg would lose his license for a full five years and ultimately bankrupt his lodge and guiding businesses. He also doubted that a judge would allow Mr. Haeg to keep the plane used in the commission of the offenses. However, at Mr. Haeg's insistence, Mr. Cole one day asked the prosecutor whether the prosecutor would object to Mr. Haeg's pleading guilty to the charges under discussion and "going open sentencing" (having the judge select all the terms of the sentence) and the prosecutor indicated he would have no objection.

Mr. Haeg and his witnesses appear to have believed that Mr. Haeg was proceeding with some version of an "open sentencing" option on November 9. Mr. Cole testified that he was prepared to go forward with the negotiated plea agreement on that day, which left to the judge's discretion only the length of the license suspension within a one- to three-year range.

Mr. Cole testified that, a few days before the hearing, the prosecutor advised counsel that he was filing an amended information to include a charge that carried a mandatory three-year license suspension. He notified Mr. Haeg of the change on November 8. In a recorded telephone call on January 9, 2005 [Exhibit 19, page 6], Mr. Cole recalled the prosecutor's change of heart somewhat differently. On that date he said that the prosecutor had threatened to amend the charges to include one that required a minimum three-year license suspension *unless* Mr. Haeg agreed to the forfeiture of the PA-12 aircraft. In any event, the news of a change in the terms of the plea agreement threw the defense team into disarray. Mr. Cole asked the prosecutor to reconsider and, in the evening hours of November 8, they eventually reached a new agreement that included all the terms of the plea agreement previously reached with the change that the license suspension would be retroactive to May 2005 and would end June 30, 2006. The form of the license suspension term was to be 36 months with 20 months suspended. The parties proposed to do just an arraignment on November 9 and then to seek approval of the agreement from the Division of Occupational Licensing before formally entering the plea. The new deal left nothing to the court's discretion, obviating the need for a contested evidentiary hearing on the moose case.

Mr. Cole, Mr. Haeg, and Mr. Haeg's witnesses went out to dinner together after the re-negotiated deal was made with the prosecutor to celebrate the disposition of the case. The next day, Mr. Haeg was arraigned on the charges.

Mr. Haeg, however, had apparently not given up on the idea of open sentencing. He did not consummate the plea agreement. He eventually discharged Mr. Cole and hired other counsel. With his new attorney, Mr. Haeg went to trial and was convicted. The judge suspended his guiding license for five years and forfeited the PA-12 aircraft. The judge that ultimately imposed sentence was the same judge that would have sentenced Mr. Haeg, had

he pleaded guilty pursuant to a plea agreement.

Mr. Haeg has not proved that Mr. Cole's services were valueless to him. Neither party offered expert testimony regarding the quality of Mr. Cole's efforts, but the panel can draw from the evidence two measures of the merits of Mr. Cole's services to Mr. Haeg. The first has to do with Mr. Cole's advice to Mr. Haeg that he should not leave the terms of the sentence to the discretion of Judge Murphy. The plea agreement that Mr. Cole presented to Mr. Haeg on November 8 was plainly more favorable to Mr. Haeg than "open sentencing" turned out to be, so it appears, with the benefit of hindsight, that Mr. Cole's advice that Mr. Haeg should accept a plea agreement was sound.

Mr. Haeg argues that Mr. Cole should have moved to suppress the evidence taken pursuant to the search warrants and should have moved for specific performance of an "open sentencing" agreement. But no evidence was presented that Mr. Haeg's second lawyer filed such motions. Comparison of the steps taken by another attorney, while not proving the quality of Mr. Cole's counsel, goes a way toward showing that a competent attorney would not necessarily have filed these motions. And, again, if Mr. Cole or another attorney had been successful in enforcing an agreement to "open sentencing", it is likely that Mr. Haeg would have gotten the same very severe sentence that was eventually imposed.

The panel has been presented no other evidence to support a finding that Mr. Cole's representation of Mr. Haeg was so deficient that no fee is due.

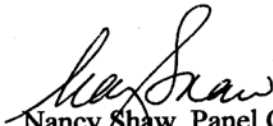
#### AWARD

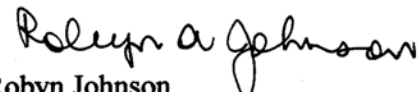
Mr. Cole conceded at the hearing that Mr. Haeg was mistakenly charged \$370 as reimbursement for a plane fare. The panel therefore finds, based on this admission, that the total fee charged Mr. Haeg should be reduced by \$370.


In other respects, the panel finds in favor of the respondent, Brent Cole. Petitioner shall pay the balance of the fee, or \$2689.19.

#### NO REFERRAL TO DISCIPLINE COUNSEL

The panel finds no basis for a referral to discipline counsel.

  
Nancy Shaw, Panel Chair  
August 12, 2006

  
Robyn Johnson  
August 25, 2006

  
Yale Metzger  
August 25, 2006