STATE OF MAINE

Board of Overseers of the Bar

BOARD OF OVERSEEERS OF THE BAR, Petitioner

v.

CLAYTON N. HOWARD, ESQ., of Damariscotta, Maine
Me. Bar No. 0115
Respondent

REPORT OF FINDINGS OF PANEL C OF THE GRIEVANCE COMMISSION

Grievance Commission
GCF# 09-053 and 09-057

On June 14, 2010, due notice having been properly and seasonably given, Panel C of the Grievance Commission conducted a disciplinary hearing open to the public according to Maine Bar Rule 7.1 (e)(2), to determine whether there were grounds for the issuance of a reprimand or whether probable cause existed for the filing of an information with the Supreme Judicial Court for further proceedings concerning alleged misconduct by Respondent, Clayton N. Howard, Esquire (Howard) as described in the Petition dated November 20, 2009 filed by the Board of Overseers of the Bar (the Board).

Assistant Bar Counsel, Jacqueline L.L. Gomes, Esquire, represented the Board, and James B. Haddow, Esquire, represented Howard; both counsel and Howard were present at the hearing. The complainant, James Metzger, was also in attendance. The Panel incorporates the Stipulated Facts offered by counsel dated June 14, 2010, and makes such additional finding as follows:

1. Since 1969, Clayton N. Howard, Esquire, of Damariscotta, Maine has been an attorney duly admitted to the Maine Bar, actively practicing from an office in Damariscotta and subject to the Maine Bar Rules.

2. On February 2, 2009, Mr. Metzger (Metzger) filed a Grievance Complaint against
Attorney Howard. In addition, Metzger’s sister, Barbara M. Hauer (Hauer) filed a Grievance Complaint dated February 6, 2009. Both the Metzger and Hauer complaints alleged violations of the Code of Professional Responsibility by Attorney Howard relative to his representation of Metzger, Metzger Restaurant Group, LLC (MRG), Ms. Hannah Sparrell and Hannah Sparrell, LLC.

3. On February 14, 2006, Attorney Howard formed Metzger Restaurant Group, LLC, with Metzger’s then-wife as the sole member. Attorney Howard was the Registered Agent for the corporation. Shortly after the parties’ divorce in December of 2006, Attorney Howard, pursuant to the parties’ Divorce Judgment, prepared documents that transferred MRG from Mrs. Metzger to Mr. Metzger. Attorney Howard remained as the corporation’s Registered Agent.

4. On May 22, 2007, Metzger’s directed Howard to transfer to Ms. Hannah Sparrell his entire interest in MRG in order to facilitate the application for a liquor license for the restaurant. As part of the transfer, Howard prepared a separate Escrow Agreement, also dated May 22, 2007, whereby Metzger would have the authority to reacquire the stock of MRG for $1,000.00. Attorney Howard’s firm was designated as the Escrow Agent.

5. Prior to the transfer, Ms. Sparrell had been working as a waitress and assistant to Mr. Metzger in his restaurant. At the time of the initial transfer to her of MRG, Ms. Sparrell was involved in a personal relationship with Metzger.

6. At various times from May 22, 2007 through September of 2008, Attorney Howard and other members of his firm had attorney-client relationships with Mr. Metzger, Ms. Sparrell, MRG and Hannah Sparrell, LLC. Hannah Sparrell considered Attorney Howard her attorney and the attorney for Hannah Sparrell, LLC from May 22, 2007 to September 2008.

7. On September 1, 2008, Mr. Metzger was charged with domestic assault; Ms. Sparrell was the alleged victim. On September 4, 2008, Attorney Howard filed Articles of Incorporation for Hannah Sparrell, LLC, which he had been directed to do by Ms. Sparrell in his office the previous day.

8. On or about September 5, 2008, Ms. Sparrell executed a Bill of Sale, prepared by Attorney Howard, transferring the assets of Metzger Restaurant Group, LLC to Hannah Sparrell, LLC. Mr. Metzger was unaware of this transfer at the time. Attorney Howard never sought his approval.

9. After Mr. Metzger contacted Attorney Howard, who was on vacation on
September 11, 2008, Howard contacted his partner and came to the conclusion that there was a conflict which would require Howard and his firm to withdraw from the representation of Metzger, and of Sparrell.

10. The panel finds that Attorney Howard did not obtain informed (verbal or written) consent to engage in the simultaneous representation of Mr. Metzger, Hannah Sparrell or Hannah Sparrell, LLC. In addition, the Panel finds that Attorney Howard breached his fiduciary duty as the Escrow Agent for the MRG, LLC stock, while at the same time preparing a document that transferred all the assets of MRG to Hannah Sparrell, LLC, which impacted on the value of the stock that Howard held as Escrow Agent for his client. Although Howard believed he had obtained consent from Metzger and Sparrell, the Panel is not convinced by a preponderance of the evidence that consent was informed. Even assuming for the sake of argument that Howard did obtain informed consent as required by Me. Bar Rule 3.4(c) and (d) when the original transfer of MRG, LLC stock to Hannah Sparrell took place in May of 2007, Howard had an ongoing obligation to reevaluate whether his ongoing dealings and representation of Hannah Sparrell created a conflict, or whether he had a duty to a current or former client. The Panel is unpersuaded that this reevaluation took place.

The panel finds that Attorney Howard violated Me. Bar Rules 3.4(a)(failure to disclose interest of a lawyer prior to commencement of representation); 3.4(b)(prohibition against commencement or continuing to represent a client if matter involves a conflict of interest where there is a substantial risk that the representation would be materially and adversely affected by the lawyer's duties to a current client or former client); 3.4(c) and (d)(No simultaneous representation without informed consent of each affected client). Each violation, in and of itself, constitutes conduct unworthy of an attorney in violation of Me. Bar Rule 3.1.

CONCLUSION

Me. Bar Rule 2(a) provides that the purpose of bar disciplinary proceedings is not punishment, but rather the protection of the public from attorneys who, by their conduct, have demonstrated that they are unable, or likely to be unable, to discharge properly their professional duties. Attorney Howard fails to appreciate that at certain points from May 22, 2007 through September 11, 2008, conflicts of interest were present at various occasions when dealing either
separately or together with Mr. Metzger and Ms. Sparrell. Considering the above facts stipulated to by the parties, together with the testimony and evidence presented, the Panel finds for the reasons stated above that misconduct occurred that violated the Maine Bar Rules.

In view of the foregoing misconduct, while also taking into consideration that during Attorney Howard’s tenure of his practice in the Maine Bar, Attorney Howard has received a private reprimand and a dismissal with a warning (in 1980 and 1995 respectively), the Panel concludes that the appropriate disposition of this Petition is that Attorney Clayton N. Howard be, and hereby is, reprimanded for violating Me. Bar R. 3.4(a)(1), 3.4(b)(1), 3.4(c)(2)(i), 3.4(c)(2)(iii), 3.4(d) and 3.1 as established in the findings of fact discussed in this report.

Dated this 12th day of July, 2010

Panel C of the Grievance Commission

[Signatures]

DAVID S. ABRAMSON, ESQ., Chair

PETER CLIFFORD, ESQ.

CHRISTINE HOLDEN, Ph.D.