STATE OF MAINE

Before the Grievance Commission
Grievance Commission File Nos. 86-5 and 86-65

BOARD OF OVEREERS OF THE BAR,

vs.

NEIL D. MACKERRON

REPORT OF FINDINGS AND DECISION

Panel D of the Grievance Commission conducted hearings in this case on April 28, 1987 and on May 5, 1987 at Augusta, Maine. Representing Panel D of the Grievance Commission for the hearings was Attorney William F. Hufnagel acting as Chairman and C. R. de Rochemont, lay member. The third member of Panel D was not present for the hearings. There was no objection to the Panel members or composition by either Petitioner or Respondent.

The hearing, which was open to the public, was conducted pursuant to Maine Bar Rule 7(e)(2)(A) to determine whether there was probable cause to file an information or take other action. The hearings considered a Petition dated February 2, 1987 filed by Karen G. Kingsley, Assistant Bar Counsel, on behalf of the Board of Overseers of the Bar. All witnesses who testified were duly sworn. Ms. Kingsley, who represented the Board at the hearing, presented testimony of the Respondent and of Attorneys Frederick Williams and Thomas E. Powers and also testimony of Beverly MacKerron. Ms. Kingsley also introduced 34 exhibits which were received into evidence by the Panel, some over the general objection of Respondent regarding relevancy because
numerous exhibits related to pending litigation which had not been resolved by the Courts, some without objection.

It was the opinion of the Chairman in admitting the exhibits that the issue under consideration in the hearing was the course of conduct of the Respondent rather than the technical outcome of the cases involved that had not yet been resolved in the courts. Respondent was given the opportunity to explain all pending litigation to allow the Panel to consider the weight to be given to such evidence relevant to Respondent's course of conduct. Ms. Kingsley made opening and closing remarks and also cross-examined Respondent's witnesses.

The Respondent appeared in person and represented himself pro se. In addition to testifying himself, the Respondent presented testimony of his son Peter MacKerron. When the Respondent sought near the end of the hearing to call Karen Kingsley as a witness, the Chairman denied his request as inappropriate as the purpose stated for calling Assistant Bar Counsel was to determine the thoroughness of the Board's investigation; it was ruled that Mr. MacKerron as Respondent had the right to present his own defense, refute evidence presented by Petitioner, and cross-examine the witnesses presented, thus his request to call Ms. Kingsley was denied without further objection.

The Respondent offered 11 exhibits, all of which were received into evidence without objection.
Having reviewed all of the documents and other evidence presented at the hearing, having evaluated the credibility of the witnesses who testified, and having reflected upon the evidence and arguments of the parties respecting the issues raised by this case, the Panel now makes the following findings and conclusions.

FINDINGS AND CONCLUSIONS

With regard to Respondent's motion to dismiss on the grounds that the Petition fails to present a claim for which relief can be granted under the Maine Bar Rules, such motion to dismiss was denied. Respondent claimed that he was at all times not representing a client nor engaging in the professional activities of a lawyer but was merely acting as a party addressing personal matters between himself and his former spouse, Beverly MacKerron. The Respondent's Motion to Dismiss was denied by the Chairman on the grounds that under Rule 1A any attorney admitted to or engaging in the practice of law in the State shall be subject to the Court's supervision and disciplinary jurisdiction and the provisions of the Bar Rules. The purposes of the Rules under Rule 2 are to set standards for attorneys regarding their practice of law, relationships with their clients, the general public, other members of the legal profession, the Courts and other agencies. The Bar Rules provide for inquiries as to the fitness of an attorney as an officer of the Court. An attorney that represents himself or herself in a proceeding is still acting as an attorney even though the attorney and the client, as
in this case, happen to be one and the same person. An attorney who is a party to Court or other legal proceedings cannot shed his or her responsibilities under the Bar Rules while acting as his or her own counsel. Finally, the Court Rules provide that any act or omission by an attorney individually or in concert with others, which violates any of the Bar Rules, constitutes misconduct and grounds for discipline notwithstanding that the act or omission did not occur in the course of an attorney-client relationship or in a Court proceeding.

Thus Commission Panel D ruled that based on the facts alleged in the Petition, correspondence on legal letterheads, and representations in Court documents as an attorney, Respondent was subject to the Maine Bar Rules and his course of conduct was subject to scrutiny by the Commission with the potential for discipline.

The essential allegations of this case were that Mr. Neil D. MacKerron pursued a course of conduct which involved the Respondent suing the various attorneys representing Beverly MacKerron, which suits resulted in her counsel's withdrawal from representation because of the possibility of their being witnesses or participants in litigation involving their client and thereby denying Beverly MacKerron a reasonable opportunity to be represented by counsel. Respondent was engaging in conduct prejudicial to the administration of justice. Credible testimony was heard from Attorneys Williams and Powers, attorneys of Mrs. MacKerron, that they believed the suits brought against them by
the Respondent were for the purpose of harassment. Further allegations by Bar Counsel involved communications by Respondent, as an attorney, with his former wife, a party in various litigation or property issues, after being requested by wife's counsel that all such communication be directed through counsel for Beverly MacKerron. Additional allegations involve issues of the Respondent communicating directly with the Judge in a pending court matter involving issues of the merits of the case without the consent or presence of opposing counsel.

The Panel finds violation of Bar Rules 3.2(4) and 3.7(a) regarding a course of conduct that appears to utilize Respondent's position as an attorney in seeking to harass another. Although it is up to the Court to decide the merits of the various McKerron cases, there does appear to be legitimate issues of fact to be resolved regarding property rights involving escrow arrangements with certain attorneys. Based on a review of all the various complaints and demands, however, it appears that Respondent sought in some instances to bring litigation against opposing counsel based on Respondent's objection to their advice to their client, Beverly McKerron, rather than the Respondent seeking redress based on actions of his former spouse. If, as suggested by Mr. McKerron, Mrs. MacKerron acted on improper advice of her counsel the remedy would be hers to pursue, not the Respondent, Mr. MacKerron suing Mrs. McKerron's counsel. Where issues of an alleged breach of an escrow agreement involving opposing counsel are before the Court, such issues would appear
to involve property rights and should properly be resolved by the Court. Such remedies should not be denied Respondent by characterizing them as violations of the Bar Rules. The Court may, after a hearing on the facts, determine whether or not sanctions should be imposed.

It would appear that Respondent walks a fine line in bringing further actions against Thomas R. Downing, Beverly J. MacKerron, Augustus Pratt and the State of Maine involving the same basic facts alleged in prior proceedings concerning a Promissory Note which according to the divorce judgment was to be executed subsequent to the divorce. Because of the multitude of suits based on variations of the same basic facts, it would appear that the course of conduct of Respondent as an attorney representing himself constitutes actions on behalf of Respondent individually amounting to a certain degree of harassment. Because some of these issues are still pending before the Court, the Panel does not feel the Respondent's course of conduct justifies disciplinary action more severe than a reprimand at the present time. The Panel does wish to note that it appears Respondent sometimes has difficulty in distinguishing between his role as an attorney and his conduct as a party.

The Panel further finds a violation of Rule 3.7(h)(2) involving conduct during litigation amounting to contact with a judge in the absence of opposing counsel. Clearly the correspondence from Respondent to Judge Paul MacDonald, Board Exhibit 16 dated October 29, 1985, constituted a communication
Involving the merits of the case in the absence of opposing counsel. Respondent admitted in testimony that although in the course of 30 years of practice it was his general custom to present opening arguments in a case, he admitted that this was the only instance in which he had presented such opening argument in a letter to the judge without the presence of opposing counsel. In the opinion of the Panel this was a violation of Rule 3.7(h)(2). The Panel did not feel the communication with Judge Alan Pease in Board Exhibit 18 dated March 10, 1986 involved the merits of the case, but merely an attempt to schedule a hearing on the motion.

The Panel further finds technical violations of Rule 3.6(j) involving communications with an adverse party during the course of representing himself, after being requested by counsel for the adverse party to communicate directly through counsel. However, in the course of the evidence presented in this hearing the former wife continued to communicate on occasion directly with Respondent on various issues, thus complicating, by her actions, the potential for technical violation of the Rule by Respondent.

Clearly, the facts of this case are complicated by the emotional implications of Respondent and his former wife, Beverly MacKerron, working through a divorce and subsequent property settlement issues. However, if Respondent chooses to represent himself in these various proceedings he must clearly understand not only his own rules of conduct as an attorney but the rules of
conduct established by the Maine Bar Rules to which standards of ethical conduct Respondent must be held accountable. Although the Panel did not find evidence of technical threats of criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter, there was clearly evidence and testimony of verbal or written threats that could be interpreted to serve no other purpose than to be intimidating, which in light of other circumstances could be interpreted as conduct unworthy of an attorney, even if not a technical violation of the specific language of Rule 3.6(b).

DISPOSITION

Based on the foregoing findings and conclusions, the Panel directs that the Respondent, Neil D. MacKerron, be reprimanded and that he be furnished with a copy of this decision.

Dated the 30th day of June, 1987.

PANEL D OF THE GRIEVANCE COMMISSION

[Court signature]

C. R. DeRochemont