NOT TO BE PUBLISHED IN THE MAINE REPORTER

STATE OF MAINE
SUPREME JUDICIAL COURT

BOARD OF OVERSEERS OF THE BAR,

Petitioner

v.

JACOB APUZZO, ESQUIRE,

Respondent

Docket No. BAR-94-6

ORDER

This matter involves a petition for review of the delivery of a public reprimand on July 12, 1994 by a disciplinary panel of the Grievance Commission. In accordance with the terms of M. Bar R. 7.2 (a)(4), the review of the decision of the Commission is based upon the record of the proceeding before the Commission. Any findings of fact of the Commission shall not be set aside unless clearly erroneous. The court affirms the decision of the Commission.

The Commission's Findings.

In December 1991 Margaret C. L'Heureux (hereinafter "Complainant") hired Attorney Jacob Apuzzo (hereinafter "Respondent") to represent her in a divorce proceeding brought by her husband. On May 6, 1992, as part of his representation of Complainant, Respondent drafted and served on opposing counsel a request for production of documents that sought

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1Since the panel acts for the Commission, the Court shall refer in its decision to the "Commission."
financial information for the entire 13 year period of the L'Heureux marriage. Although Respondent anticipated that opposing counsel would object to producing records for such a substantial period of time, he acceded to Complainant's wish that such production be sought.

On May 15, 1992, opposing counsel wrote a letter to Respondent objecting to the 13 year request and further indicating that he would voluntarily provide two years of information. Opposing counsel also indicated that he would file a motion for a protective order in the event that the two year offer was not accepted.

Although Respondent believed that opposing counsel would voluntarily accept a five year period of discovery (the same period for which information had been requested of Complainant by opposing counsel) and that the court might order production for as much as an eight year period, Respondent testified before the Commission that he was unable to persuade Complainant to accept anything less than a full 13 year period of discovery. He further testified that he made clear to Complainant that he could not file a response to the motion for protection insisting on the 13 years of production because of the requirements of M.R. Civ. P. 11 and that if she persisted in her position, she should get a new lawyer.

Respondent filed no response to the motion for protection despite the requirement of M.R. Civ. P. 7 that opposition to such a motion must be filed within 21 days or all objections to the motion are deemed waived. On July 21, 1992 Complainant sent Respondent a certified letter discharging him as her lawyer and requesting him to "mail all records that pertain to my case"
to her mother's address. She further stated that Respondent would receive payment upon her receipt of the records. Complainant also informed the court directly by letter of the same date that the Respondent no longer represented her and that she was seeking other counsel.

Soon thereafter, Complainant hired attorney Kenneth Altshuler to represent her. On August 14, 1992, Attorney Altshuler wrote to Respondent and requested that the Respondent "forward to me [Complainant's] file at your earliest convenience." Respondent did not forward Complainant's file either to Complainant's mother or to Attorney Altshuler. On August 18, 1992, Attorney Altshuler entered his appearance on behalf of Complainant. Attorney Altshuler was unaware of the pending motion for protection. On August 20, the Superior Court granted the unopposed motion for a protective order and forwarded a copy of the order to Attorney Altshuler. Attorney Altshuler's subsequent motion for reconsideration was denied. As a result, Complainant was limited to two years of her husband's financial records in the divorce action, which subsequently settled before trial.

Although Respondent insisted that he had explained to Complainant the significance of the motion for protection and the consequences of a failure to respond to it, Complainant denied that she had received such an explanation. The Commission accepted Complainant's testimony:

We accept the testimony of Ms. L'Heureux that the filing of the motion for protective order, the need to oppose it, and the consequences of not doing so were not effectively communicated to her, if communicated at all. The failure to do so disabled Ms. L'Heureux from protecting herself and successor counsel from preserving her right to oppose the motion.
There is ample evidence in the record to support this finding of the Commission, which was not compelled to accept Respondent's version of his dealings with Complainant.

Having made this factual finding about Respondent's failure to address the motion for a protective order, the Commission was required to assess its legal significance under the Bar Rules, as well as the legal significance of two other related findings that are disputed only in terms of their legal significance: the failure to file a motion to withdraw as counsel for Complainant, and the failure to turn over Complainant's legal file.

The Violations of the Bar Rules

1. **M. Bar R. 3.5(a)(1).**

This Bar Rule provides as follows:

If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

This rule must be read in conjunction with M.R. Civ. P. 89(a):

An attorney may withdraw from a case in which the attorney appears as sole counsel for a client, by serving notice of withdrawal on the client and all other parties and filing the notice, provided that (1) such notice is accompanied by notice of the appearance of other counsel, (2) there are no motions pending before the court, and (3) no trial date has been set. Unless these conditions are met, the attorney may withdraw from the case only by leave of court.

Rule 89(a) governed the withdrawal of Respondent from the divorce action in the Superior Court. Given the pendency of the motion for protection, Respondent could not withdraw from the case without obtaining permission of the court. His discharge by Complainant did not accomplish
that withdrawal, nor did the subsequent entry of an appearance by Attorney Altshuler do so. Moreover, M. Bar R. 3.5(b)(2)(iv) required Respondent to withdraw from his employment by Complainant subject to court approval. Respondent's contention that he "in effect" withdrew from the case and that no motion to withdraw was required reflects a misunderstanding of the applicable rules.

The importance of compliance with M. Bar R. 3.5(a) and M.R. Civ. P. 89(a) is made abundantly clear by the facts of this case. If Respondent had filed the motion to withdraw, he would have been required to note in the motion both his discharge by Complainant and the pendency of the motion to protect. This disclosure would have increased the likelihood of a response to the motion to protect, either because of court action in ruling on the motion to withdraw or because of the awareness of successor counsel that there was such a motion pending.

The Commission concluded correctly that Respondent violated M. Bar R. 3.5(a)(1).

2. M. Bar R. 3.5(a)(2).

This Bar Rule provides as follows:

A lawyer shall not withdraw from employment until the lawyer has taken reasonable steps to avoid foreseeable prejudice to the rights of the lawyer's client, including giving due notice to the client, allowing time for employment of other counsel,

2M. Bar R. 3.5(b)(2) (iv) reads as follows:

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and the lawyer representing a client in other matters shall withdraw from employment if: ... (iv) The lawyer is discharged by the client.
delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Respondent’s failure to deliver to Complainant all of the papers to which she was entitled is unmistakable. Even if she had copies of most of the documents in her file, a contention advanced by Respondent to defend his conduct, that fact does not lessen Respondent’s obligation to turn over to Complainant her legal file as she had requested.³

Respondent also gains nothing from the assertion that he would have turned over the file of Complainant to her or her attorney if either of them had come to his office. The Commission was amply justified in finding that Respondent never communicated such willingness to turn over the file to Complainant or her attorney.⁴

Respondent further violated Rule 3.5(a)(2) by failing to timely respond to the motion for protection during the withdrawal process, or by failing to convey to Complainant the importance of such a timely response, thereby seriously prejudicing Complainant’s rights in her divorce action. Respondent’s argument that he cannot be held accountable for this violation is a striking example of his failure to understand the import of the Bar Rules that govern his conduct. He notes that he was discharged by Complainant on July 21, 1992. He further notes that the motion for protection was filed on June 4, 1992, and that the response to that motion would have to be filed

³Cf. M. Bar R. 3.5(a)(2) (requiring attorney to deliver all papers to which client is entitled).

⁴This Court assumes without deciding that such a willingness would meet Respondent’s obligation under the Rule.
by June 25, 1992, under the 21 day rule of M.R. Civ. P. 7. Respondent then argues that the prejudice from the failure to respond to the motion had already occurred at the time of his discharge on July 21, 1992 and, hence, he cannot be held accountable for prejudicing the rights of Complainant under a Bar Rule that deals only with avoiding prejudice during the withdrawal process.

The operation of the 21 day rule in M.R. Civ. P. 7 is not self-executing. There is no waiver of the right to object to the pending motion until a judge signs an order granting the requested relief in light of a failure of the opposing party to respond. The order granting the unopposed motion for protective order was not signed until August 20, 1992. Respondent had ample time from the time he received notice of his discharge by Complainant to accomplish a proper withdrawal under Rule 3.5 and protect the rights of Complainant implicated by the pending motion for protection.

The Commission concluded correctly that Respondent violated M. Bar R. 3.5(a)(2).

3. **M. Bar R. 3.1(a) and M. Bar R. 3.6(a)(3).**

M. Bar R. 3.1(a) provides as follows:

Violation of these rules shall be deemed to constitute conduct "unworthy of an attorney" for purposes of 4 M.R.S.A. § 851 and Rule 7(e)(6)(A).5

54 M.R.S.A. § 851 (1989) provides in pertinent part:

Whenever an information is filed in the office of the clerk of courts in any county by the Attorney General, or by a committee of the State Bar Association, or by a committee of the bar or bar association of such county, charging that an attorney at law has conducted himself in a manner unworthy of an attorney . . . any justice of the Supreme Judicial Court may . . . issue a rule
M. Bar R. 3.6(a)(3) provides as follows: "A lawyer shall not . . . neglect a legal matter entrusted to the lawyer." Although both of these rules set forth general standards of "unworthiness" and "neglect," the Commission was entitled to conclude that the specific violations of Rule 3.5 involved conduct unworthy of an attorney and neglect of a legal matter entrusted to Respondent. In addition, the Commission had a sufficient basis for concluding that Respondent's failure to communicate to Complainant the importance of responding to the motion for protection also constituted the neglect of a legal matter entrusted to Respondent.

The Sanction

The Commission justified its issuance of a public reprimand on the basis of the evidence admitted at the hearing, the Respondent's prior disciplinary record, his belief that his conduct was completely justified, and the likelihood that his conduct caused his client prejudice and increased expense in the prosecution of her divorce. These considerations are contemplated by M. Bar R. 7.1(e)(3)(C). The Commission did not abuse its discretion in deciding upon a public reprimand on the basis of these considerations.

The entry is:

Decision of the Grievance Commission is affirmed.

requiring the attorney informed against to appear . . . to show cause . . .

M. Bar R. 7(e)(6)(A) was abrogated on March 20, 1992.
Dated: January 17, 1995

Kermit V. Lipez, Associate Justice