STATE OF MAINE

BOARD OF OVERSEERS OF THE BAR  

GCF# 10-321

Board of Overseers of the Bar  
Petitioner  

v.  
STIPULATED REPORT OF FINDINGS  
AND ORDER OF PANEL E OF THE  
GRIEVANCE COMMISSION  
M. Bar R. 7.1(e)(2)(E), (3)(C)(4)

Nelson A. Toner, Esq.  
of Portland, Maine  
Maine Bar #3686  
Respondent

On November 13, 2012, with due notice, Panel E of the Grievance Commission conducted a public disciplinary hearing pursuant to Maine Bar Rule 7.1(e)(2)(E), concerning alleged misconduct by the Respondent, Nelson A. Toner, Esq. This disciplinary proceeding had been commenced by the filing of a Stipulated Disciplinary Petition by the Board of Overseers of the Bar (the Board) on October 16, 2012.

At the hearing, the Board of Overseers of the Bar was represented by Bar Counsel Scott Davis, and Attorney Toner was represented by Bernard J. Kubetz, Esq.

Prior to that hearing, the parties had submitted a stipulated, proposed Report of Findings and Order for the Grievance Commission Panel's review and consideration. Having reviewed the agreed proposed findings as presented by counsel, the Panel makes the following disposition:
Findings

1. Respondent Nelson A. Toner of Portland, Maine is and was at all times relevant hereto an attorney duly admitted to and engaging in the practice of law in the State of Maine. At the time the relevant factual events occurred in this matter, Mr. Toner was subject to the then applicable Code of Professional Responsibility.

2. On or about September 14, 2010, this grievance complaint was initiated and docketed with the Board of Overseers of the Bar by Bar Counsel on a sua sponte basis against Attorney Toner under M. Bar R. 7.1(b).

3. That filing occurred as a result of a jury verdict on July 2, 2010 in favor of the plaintiff Peter Redman in the matter of Peter Redman and Northern Mattress Company, Inc. v. Nelson Toner et al, Docket No. BCD-CV-09-07. The jury found that Attorney Toner had been professionally negligent in his representation of his client, Peter Redman.

4. Attorney Toner was represented by counsel in this docketed grievance matter. Subsequent to the trial court’s ruling on post-verdict motions, counsel filed Attorney Toner’s initial substantive response on or about May 17, 2011.

5. During the course of the Board’s investigation, Attorney Toner was afforded opportunities for further supplemental responses, resulting in a fully developed investigation pursuant to M. Bar R. 7.1(b).

6. On or about August 29, 2011 a Panel of the Grievance Commission reviewed this grievance matter and its related investigation. Based upon that
review, the Panel found probable cause to believe that Attorney Toner had engaged in professional misconduct subject to sanction under the Maine Bar Rules. Accordingly, the Panel authorized Bar Counsel to prepare and present a formal Disciplinary Petition before a different Panel of the Grievance Commission.

7. Peter Redman had consulted with and hired Attorney Toner of Bernstein Shur Sawyer & Nelson (hereafter “Bernstein Shur”) on April 14, 2004. In their first meeting, Mr. Redman described that he and his brother Mark Redman were co-owners of Northern Mattress Company and had been involved in a disagreement for several years about how to manage the Company. Peter Redman explained to Attorney Toner that his goals were to preserve the family business and to work out a viable, long-term management plan for the Company with his brother. He asked Attorney Toner to represent him personally in his dispute with his brother and to try to help him achieve his goals.

8. Because Attorney Toner’s primary area of practice was taxation and estate planning with some business planning work, he suggested to Mr. Redman that it would be appropriate to bring in his law partner, John Carpenter, to assist on the matter. Attorney Carpenter’s primary area of practice is corporate law. Attorney Toner proposed that he would stay involved in the project with Mr. Carpenter. Mr. Redman agreed to that recommended plan.
9. Two days after Attorney Toner’s initial meeting with Peter Redman, Attorney Toner arranged for Attorney Carpenter and him to meet with Mr. Redman to discuss the nature of his dispute with his brother. From those initial meetings and from a review of documents, those attorneys learned that Peter and Mark Redman were co-owners of Northern Mattress, having bought all the stock of the Company from their parents in the early 1990’s. At the time Mr. Redman hired Attorney Toner, Peter Redman owned 53% of the stock of the Company and Mark Redman owned 47%. However, Peter Redman had previously signed a Shareholders’ Agreement with Mark Redman which provided that “all significant decisions” regarding the Company required the mutual consent of both brothers. Attorney Toner later learned that Peter Redman had entered into this agreement against the advice of his prior legal counsel at the time.

10. Attorney Toner also learned from Peter Redman that he and Mark Redman frequently disagreed and often had arguments in front of other Company employees. Mr. Redman told Attorneys Carpenter and Toner that he had been on a ten-month leave of absence beginning in 2003 and that leave of absence had ended shortly before he first consulted Attorney Toner. During that leave of absence, Mark Redman had essentially been running the Company. Upon Peter Redman’s return to the Company in the spring of 2004, the prior conflict between Mark Redman and Peter Redman regarding the Company’s affairs erupted anew.
11. Peter Redman informed Attorneys Toner and Carpenter that, in an effort to try to alleviate part of their dispute, he and Mark Redman had agreed in early 2004 for Northern Mattress to hire Deborah Gallant of D. Gallant Management Associates. Ms. Gallant was so employed to act as an outside Human Resources director and assist in redefining the Redman brothers’ respective management roles to make Company operations and management function better. However, the disputes between Mark Redman and Peter Redman continued after the engagement of D. Gallant Management Associates and became so disruptive that their corporate counsel had recommended that each Redman brother retain separate legal counsel. It was as a result of that recommendation that Peter Redman had consulted and hired Attorney Toner and Bernstein Shur.

12. Over the first few weeks of their representation of Peter Redman, Attorneys Toner and Carpenter had multiple conversations with their new client. They discussed the ongoing work dispute, the situation that Peter Redman found himself in under the Shareholders Agreement (joint decision-making by both brothers despite Peter Redman being the majority stockholder) and various strategies and options to try to resolve the management dispute and impasse.

13. On May 12, 2004 Peter Redman telephoned Attorney Toner and informed him that in a meeting on that date with Mark Redman and Deb Gallant, he was informed that a sexual harassment complaint had just been filed against him with Ms. Gallant by a Company employee, Tammy Simpson.
Mr. Redman telephoned Attorney Toner from that meeting. Attorney Toner advised Mr. Redman that he was unable to come over to the meeting at that moment but he advised Mr. Redman to take notes and contact him after that meeting. Peter Redman then told Attorney Toner that on May 11, 2004 Ms. Simpson had made a complaint to Ms. Gallant about Peter Redman’s behavior toward Ms. Simpson. She had claimed that Peter Redman had grabbed her hand at work on two different occasions that day which caused her to be “freaked out.” The first alleged offensive hand-touching had occurred outside Peter’s office at Northern Mattress when he had “casually grabbed her hand” as if to shake it. Peter then later that same day allegedly followed her into her office, took and held her hand for an “uncomfortably long time” (15 to 20 seconds) and had then pounded his chest area near his heart stating to Ms. Simpson that “you are in here.”

14. Following the May 12, 2004 meeting, Mr. Redman sent Attorney Toner the notes he made at that meeting. The notes included the following:

As a HR Person hired by the Company she [i.e. Deb Gallant] is looking out for the best interests of the Company. She felt that I should take two weeks of (sic) pending investigation. I agreed. Tammy is a great asset to the Company.

There are papers that I need at work, to go get them we would have to set up a time when Tammy is not there to get things that I need. We all agreed.

I told Deb Gallant that I would do whatever is in the best interest of the Company. She wrote on a piece of paper for me to stay away from work while Tammy was there.
15. Peter Redman told Attorney Toner that he had done nothing wrong, but did inform him that Northern Mattress had directed Ms. Gallant to investigate the Simpson complaint. Attorney Toner and Mr. Redman agreed to wait and see what she concluded. After briefly speaking with Mr. Redman on May 12th, Ms. Gallant never contacted him again concerning his response to Ms. Simpson's harassment complaint against him.

16. Ms. Gallant investigated the Simpson complaint, prepared a report and presented a report of her investigation to Peter Redman at a meeting on May 19, 2004.

17. In her Report Conclusions and Recommendations [the Gallant Report], Ms. Gallant stated:

After reviewing internal documents in detail and analyzing the interview notes from meetings and telephone conversations with Peter, Mark Redman, Mark Bell and Tammy Simpson, Deborah Gallant concludes that the situation presented in Tammy’s complaint is very serious. Tammy has brought this situation up to the management of Northern Mattress & Furniture Galleries on numerous occasions over the years. Her request is fairly straightforward. Tammy is asking Peter to please stay away from her, leave her alone, and not talk to her. Deborah, Peter and Mark Redman had talked about this request several times previously and subsequently they structured Peter’s role at the Company appropriately to accommodate that request. Peter, however, has not adhered to the request or the structure that we had set up. Peter was asked to submit advice and suggestions (related to Tammy’s areas of responsibility) through Mark Redman. Instead, Peter goes into the office on a day that he knows Mark Redman is in Massachusetts, and repeatedly communicates directly to Tammy throughout the day and after, despite her repeated requests not to.

It is strongly recommended that Peter’s office be permanently moved outside of the Main Street Fairfield Building (were (sic) Tammy located).
18. Peter Redman provided Attorney Toner with a copy of the Gallant Report. Mr. Redman told Attorney Toner he believed he had done nothing wrong or improper with Ms. Simpson. Given that Mr. Redman did not deny to him the facts in the Gallant Report, Attorney Toner did not conduct a further investigation of the veracity of Ms. Simpson's accusations against Peter Redman. Instead, with Mr. Redman's agreement, he provided the Report to Kate Debevoise, a Bernstein Shur attorney specializing in employment law and employment discrimination matters, to seek her opinion as to whether the facts in the Gallant Report could give rise to a claim by Ms. Simpson under Maine law. From his discussions with Peter, Attorney Toner knew that Peter was very upset that Ms. Simpson had made a complaint with those accusations.

19. Attorney Toner did immediately consult with Attorney Debevoise, a shareholder of Bernstein Shur, who had substantial experience representing employer clients before the Maine Human Rights Commission, and had lectured and written extensively on the subject of employment discrimination. Attorney Debevoise reviewed the Gallant Report and the Company's Employee Manual, and called Ms. Gallant. She noted that the Gallant Report did not contain a specific factual finding that Peter Redman had done anything wrong.

20. Attorney Debevoise told Attorney Toner that she had spoken to Ms. Gallant and that Ms. Gallant told her she had concluded that Ms. Simpson's complaint was serious and had merit and proposed a remedy to make sure that Peter Redman and Ms. Simpson did not interact at work.
Attorney Debevoise reported to Attorney Toner that Ms. Gallant told her that she was concerned that Ms. Simpson would file a complaint against Peter Redman and the Company with the Human Rights Commission, and that Ms. Gallant was worried that such a complaint could hurt Peter Redman and the Company.

21. Attorney Debevoise also told Attorney Toner that, based on what she had learned, she concluded that this was a serious matter with potential risks to Mr. Redman. She said that regardless of whether Peter Redman agreed with the investigation done by the Company's own Human Resources Director, there was really no practical way for Bernstein Shur to do an independent fact investigation that would supersede the investigation by the Human Resources Director of the Company. As a result, she advised that the Human Rights Commission would most likely place great weight on a report that had been done by Ms. Gallant in that capacity.

22. Attorney Debevoise further informed Attorney Toner that her assessment, based on her experience and review of the Company's employment manual and the Gallant Report, was that, regardless of whether Peter Redman was subjectively blameless, there was a serious risk of a legal complaint against Mr. Redman personally, especially if he chose not to follow the recommendations of the Gallant Report.

23. Attorney Toner recalls having numerous telephone conversations with Peter Redman in May and early June 2004, and discussing with him Attorney Debevoise's evaluation of the Gallant Report and the options available
to Mr. Redman on how to proceed. They discussed the option of contesting the Simpson complaint or trying to resolve and defuse it and the likely consequences of pursuing those two different options. As a result of those discussions and the information and options given to Mr. Redman in those conversations, Attorney Toner believed Mr. Redman wanted him to try to resolve the Simpson dispute in a non-litigious manner, an option that Attorney Toner had previously explained to him. Attorney Toner, however, failed to make any notes of all those conversations with Peter Redman and he did not send a written message to Mr. Redman confirming the conversations or Mr. Redman’s decision. Attorney Toner asserts that in his over 25 years of practice it had not been his pattern to make detailed notes of every conversation with clients or to always send letters, memos or emails to clients confirming all conversations.

24. At the suggestion of Attorney Toner and with the agreement of Peter Redman, Attorney Carpenter had been working on some of the business involved in the Peter Redman vs. Mark Redman dispute. Attorney Carpenter testified at trial that Peter Redman contacted him in late May or early June 2004 to ask Attorney Carpenter if he believed that Mr. Redman had made a good decision in directing Attorney Toner to try to resolve and defuse the Simpson complaint without litigation or proceedings before the Maine Human Rights Commission. Attorney Carpenter also testified that he responded and told Mr. Redman he thought he had made a good decision, and one that allowed
him and his attorneys to stay focused on Mr. Redman’s goals of preserving the integrity and value of Northern Mattress Company.

25. Notwithstanding Attorney Toner’s and Attorney Carpenter’s trial testimony regarding these events, Attorney Toner recognizes that Superior Court Chief Justice Humphrey determined, in his February 4, 2011 Order on Defendants’ Rule 50 and Rule 59 Motions, that the jury in the Redman v. Toner and Bernstein Shur civil case could have found, in the face of conflicting evidence, that Mr. Redman told Attorney Toner that he wanted to fight the accusations, that Attorney Toner and Bernstein Shur did not follow Mr. Redman’s instructions and that Attorney Toner decided to resolve the situation without Mr. Redman’s knowledge or authority.

26. As a means of so resolving and not contesting the Simpson complaint, Attorney Toner asked Attorney Debevoise to prepare a memorandum from Mark Bell, the General Manager of Northern Mattress, to Ms. Simpson. Although the “Bell memo,” as it later became known, was signed by Mark Bell, it was actually drafted by Attorney Debevoise. According to Chief Justice Humphrey’s February 4, 2011 Order, the jury could have found that Adam Taylor, Mark Redman’s attorney, had input in the drafting of the Bell Memo.

27. Attorney Debevoise sent a draft of that memo to Ms. Gallant who made changes which were incorporated into the final version of the Bell memo. As issued, the substance of the Bell memo was that Ms. Simpson’s allegations against Peter Redman – and the findings and conclusions of the
Gallant Report, e.g. that the Company was going to have Peter Redman work at home to avoid contact with her – were accurate and to be implemented.

28. Without first so informing or providing his client, Peter Redman, with any opportunity to review or approve the contents of the Bell memo, on June 10, 2004 Attorney Toner sent that final version of the Bell memo to Mark Bell for him to sign and deliver to Ms. Simpson. She received it on June 11, 2004.

29. As issued and received by Ms. Simpson, the Bell memo *inter alia* stated to her the following:

   Ms. Gallant concluded that your expressed concerns were legitimate and has recommended that the most effective course of action in these circumstances is to establish an office for Peter at a remote site (not located at the Main Street Fairfield building) and require that he have no contact of any nature with you.

   Management has accepted the conclusions and recommendations of Ms. Gallant concerning your complaint.

30. Again, notwithstanding the trial testimony of Attorneys Toner and Carpenter, Chief Justice Humphrey noted in his February 4, 2011 Order that the jury could have found that Peter Redman was not informed by Attorney Toner that he was resolving the Simpson complaint matter in this way and against his instructions, and did not know that his attorney was consulting in that regard with his brother’s attorney. Peter also did not receive a copy of the Bell memo until after it was presented to Ms. Simpson.

31. Assuming that Attorney Toner may have reasonably believed that Mr. Redman had approved the course of action reflected in the Bell memo, he
agrees that he never provided Peter Redman with a draft copy of the memo for his review and approval. Although Attorney Toner may have believed the Bell memo reflected the steps that Mr. Redman had already agreed to in his discussions with Attorney Toner, he agrees that he should have – but failed to – properly so communicate and confirm in writing his understanding of his client's decision on how to resolve the Simpson matter.

32. Attorney Toner now agrees and admits his failure to do so was a violation of then applicable Maine Bar Rule 3.6(a) (keeping a client informed about that client's legal affairs).

33. Attorney Toner does not personally know when Mr. Redman first saw the Bell memo or how it came to his attention. However, he does agree that on July 21, 2004 he sent a letter to the new corporate counsel for the Company. That letter related in part to the Simpson complaint, and included a copy of the Bell Memo. Attorney Toner sent a contemporaneous copy of that letter to Peter Redman (he is shown as a “cc w/enc.”). As a result, Peter Redman had then indirectly learned about the Bell Memo by that date at the latest.

34. Mr. Redman fired Bernstein Shur in late August 2004 and hired another law firm, Brann & Isaacson. Tammy Simpson did not file a Human Rights Commission complaint or a lawsuit against Peter Redman or the Company.

35. On November 20, 2008, more than four years after he fired Attorney Toner, Peter Redman filed suit against Attorney Toner and Bernstein
Shur alleging professional negligence. The jury trial resulted in a $7.3 million Plaintiff's verdict in July 2010. That matter then settled while an appeal was pending. Peter Redman never filed any grievance complaint with the Board against Attorney Toner or any other attorney at Bernstein Shur.

**Conclusion and Sanction**

The former Code of Professional Responsibility and the current Maine Rules of Professional Conduct each specifically require attorneys to uphold their duties to clients. Those duties include keeping a client informed as to the status of the legal matter the attorney is handling for a client. The Panel acknowledges Attorney Toner's explanation that he understood and believed Peter Redman had instructed him to attempt to resolve the Tammy Simpson matter on a non-litigious basis instead of challenging Ms. Simpson and the Report of the Company's Human Resources director and possibly causing Ms. Simpson to file a complaint with the Maine Human Rights Commission and/or the courts or trigger a further dispute with Mark Redman. The Panel recognizes Attorney Toner's belief that he may have misunderstood Peter Redman's decision and instructions on how to proceed.

Nevertheless, Attorney Toner's failure to deliver a copy of the Bell memo to Peter Redman before it was sent to Mark Bell was improper. Attorney Toner now admits, and the Panel so finds, that regardless of whether he may have believed at the time that he was following Mr. Redman's instructions and that he had been authorized to take the steps necessary to carry out those instructions, he should have provided Mr. Redman with a copy of the Bell
memo in draft form before or at the latest, as it was provided to the Company's general manager, Mark Bell, for execution and delivery to Tammy Simpson. Had Attorney Toner taken those precautionary steps, Mr. Redman would have had the opportunity to review the course of action being pursued by his counsel. Mr. Redman could have then contacted Attorney Toner to inform him if those actions being taken by Attorney Toner were directly contrary to Mr. Redman's desires. By failing to take those required and important steps, even if he acted in a good faith belief that he was following his client's instruction, Attorney Toner failed to keep his client fully informed of the status of his legal affairs, in violation of Bar Rule 3.6(a).

The Panel notes that over the course of his 25-year career as an attorney, this is the first instance in which a grievance complaint of any kind has been filed against Attorney Toner.

Since the evidence of misconduct supports a finding and Attorney Toner agrees he did in fact violate the Code of Professional Responsibility, specifically Maine Bar Rule 3.6(a), the Panel finds that its issuance of a Public Reprimand is an appropriate sanction.

Therefore, the Panel accepts the agreement of the parties including Attorney Toner's separately executed waiver of the right to file a Petition for Review. The Panel concludes that the appropriate disposition of this matter is the issuance of a Public Reprimand to Nelson A. Toner, Esq., which is now hereby issued and imposed upon him in accordance with Maine Bar Rule 7.1(e)(3)(C)(4).
Date: 11.13.2012

Victoria Powers, Esq., Panel Chair

Date: 11.15.2012

John C. Hunt, Esq.

Date: 11.13.2012

Marge M. Medd