STATE OF MAINE

Board of Overseers of the Bar

Grievance Commission
File Nos. 07-308 & 07-309

BOARD OF OVERSEERS OF THE BAR

Petitioner

v.

JED DAVIS, ESQ.
of Fayette, Maine,
Me. Bar No. 1686

Respondent

REPORT OF FINDINGS
OF GRIEVANCE
COMMISSION PANEL D

On December 29, 2008, pursuant to due notice, Panel D of the Grievance Commission conducted a disciplinary hearing open to the public according to Maine Bar Rule 7.1(c)(2), concerning the Respondent, Jed Davis, Esq. This disciplinary proceeding was commenced by the filing of a Disciplinary Petition by the Board of Overseers of the Bar through Bar Counsel on July 11, 2008, alleging violations of M. Bar R. 3.1(a), 3.6(c), and 3.6(g).

At the disciplinary hearing, the Board was represented by Assistant Bar Counsel Jacqueline L. L. Gomes, and Respondent was present and represented by Peter J. DeTroy, Esq. The Board’s exhibits marked Board Exh. 1-12, and Respondent’s Exhibit 1, were admitted without objection.1 The Panel heard testimony from Attorney Davis, David Lothridge, Shannon Shea, Ryan Shea, Karen Lothridge, and Craig Donovan.

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1 Respondent also provided copies of various professional ethics opinions, cases, and other interpretive guidance, marked Resp. Exh. 2-6, but did not move their admission. The Panel views those materials as providing assistance with legal conclusions, rather than as evidence on any disputed factual issues.
Having heard the testimony and reviewed the evidence submitted, the Panel hereby makes the following findings:

FINDINGS

Respondent is, and was at all times relevant here to, an attorney duly admitted to and engaged in the practice of law in the State of Maine, and subject to the Maine Bar Rules. In August 2007, Mr. Donovan engaged Respondent in connection with a dispute with his neighbors over the use of a private camp road. On August 30, 2007, Respondent sent identical letters to Mr. and Mrs. Lothridge, and to Mr. and Mrs. Shea, that contained, among other things, the following paragraph:

I don’t know if you’re mentally ill or just nasty; but your outrageous behavior must cease immediately. My client has a right-of-way over Lothridge Lane, and it is illegal for you to interfere with his use of it. (By the way, the last mentally-ill person who tried to do this to a client of mine ended up in jail.)

The four recipients of this letter filed complaints with the Board of Overseers. Ryan Shea, Shannon Shea, and David Lothridge each complained, and subsequently testified, that they found the letter insulting, demeaning, threatening, and unprofessional. Karen Lothridge wrote:

I feel it was an expressed threat for Mr. Davis to say, “By the way, the last mentally ill person who tried to do this to a client of mine ended up in jail.” He is inferring we are all “mentally ill” and we may get jail time. NOT AT ALL PROFESSIONAL . . . . If I were a lawyer I would be ashamed to admit that Mr. Davis was a lawyer also.

In response to the complaints, Respondent listed various actions that his client had alleged the complainants to have committed, and concluded, “Given such outrageous behavior, my letter was not unreasonable.” Respondent admitted at the hearing, however,
that he had not investigated the facts of the matter in any way prior to sending the letter, and had relied entirely on the version of the facts that was related to him by his client.²

At the hearing, Respondent’s client testified that he had reviewed the letter before it was sent, and that he understood it to threaten the recipients with criminal prosecution. Each of the recipients also testified that they so understood it. Respondent, however, testified that he never even considered the possibility that his reference to an adverse party who “ended up in jail” could be interpreted as a threat to present criminal charges; instead, he testified that the wording of his letter related only to the unique circumstances of a previous right-of-way dispute in which he had been involved, in which the adverse party had been jailed for contempt after violating an injunction issued by the Superior Court. The Panel did not find Respondent’s explanation credible. Further, Respondent was unable to provide any plausible explanation of what purpose the reference to “jail” might have served, if it was not intended as threat to present criminal charges, and if its purpose was not solely to obtain an advantage in this civil matter.

CONCLUSIONS

The Panel concludes that Respondent has conducted himself in a manner unworthy of an attorney in violation of M. Bar R. 3.1(a), both generally through the use of abusive language in his letter to the complainants, and specifically by threatening to present criminal charges solely to obtain an advantage in a civil matter in violation of M. Bar R. 3.6(c).³

² At the hearing, both Bar Counsel and Respondent presented evidence as to the facts of the underlying right-of-way dispute. The Panel considered that evidence only to evaluate Respondent’s state of mind and purpose in sending the letter.
³ The Panel concluded that notwithstanding the reference to “a client of mine” (emphasis added), the letter did not imply any improper influence in violation of M. Bar R. 3.6(g).
Of great concern to the Panel is Respondent's contention that only conduct expressly prohibited by the Code of Professional Responsibility is subject to sanction. The Panel finds Respondent's view of the scope of sanctionable misconduct to be unduly constrained. The Maine Bar Rules specifically state that they are "intended to provide appropriate standards for attorneys with respect to their practice of the profession of law, including, but not limited to, their relationship with their clients, the general public, other members of the legal profession, the courts and other agencies of the State," M. Bar R. 2(a), and that "the prohibition of certain misconduct in this Code is not to be interpreted as an approval of conduct not specifically mentioned." M. Bar R. 3.1(a). Because the proceeding before this Panel is "an inquiry to determine the fitness of an officer of the court to continue in that capacity," M. Bar R. 2(a), and because 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, the Panel reaffirms its view that conduct that is not specifically prohibited by the Code, but that a reasonable attorney should know to be "conduct unworthy of an attorney," may be subject to sanction. As this Panel has previously stated:

"Attorney behavior, particularly in the context of representation of a client, must be worthy of our profession. . . . 'Any verbal abuse of an adversary is unworthy of an attorney regardless of the circumstances.'" Board of Overseers v. Neal L. Weinstein, GCF 03-252 (July 30, 2004) (quoting Board of Overseers v. Richard B. Slodberg, BAR 92-13, 93-3, and 95-9 (Mar. 21, 1996). "The zeal employed by an attorney in guarding the interests of his clients must always be tempered so as not to inject his personal feelings or display a demeanor that subjects parties to a proceeding or opposing counsel to certain indignities." Id. (quoting Office of Disciplinary Counsel v. Jackson, 84 Ohio St. 3d 386, 387-388, 704 N.E.2d 246 (1999). In the Weinstein matter, Panel E of the Grievance Commission concluded that the respondent's verbal abuse and physical confrontation was "conduct prejudicial to the administration of justice, a dramatic failure to exercise
reasonable care and skill, and a grievous shortage of 'lawyer's best judgment' in the performance of professional services," and appeared to be "action on behalf of the client which the lawyer knows, or should know, would merely serve to harass or maliciously injure another." *Id.*

*Board of Overseers v. James L. Audifred*, GCF 05-286 (Sept. 1, 2006). The Panel therefore believes that Respondent's use of gratuitously offensive and abusive language in his letter to the complainants, without more, could have constituted misconduct subject to sanction under the Maine Bar Rules, and was behavior inconsistent with the office of an attorney.

The Panel also concludes, however, that Attorney Davis violated a specific provision of the Code of Professional Responsibility, namely the prohibition in M. Bar R. 3.6(e): "[a] lawyer shall not . . . threaten to present . . . criminal . . . charges solely to obtain an advantage in a civil matter." The Panel concludes that, contrary to his assertion at the hearing, Respondent did specifically intend the statement in his letter to serve as a threat to present criminal charges, and that his sole purpose in doing so was for advantage in this civil matter. Accordingly, Respondent has engaged in misconduct that is subject to sanction under the Maine Bar Rules.

**SANCTION**

In considering an appropriate sanction under the Bar Rules, the Panel must consider the following factors set forth in M. Bar R. 7.1(e)(3)(C):

(i) whether the attorney has violated a duty owed to a client, to the public, to the legal system, or to the profession;

Respondent's actions clearly violated duties owed to the legal system, to the profession, and to the public. Respondent's letter was not merely, as Respondent characterized it, "indecorous," but gratuitously abusive. Further, Respondent clearly
threatened to present criminal charges solely to obtain an advantage in a civil matter. The Panel is unable to conclude that Respondent’s misconduct was minor.

(ii) whether the attorney acted intentionally, knowingly, or negligently;

The Panel concludes that Respondent’s conduct was intentional and knowing. In particular, the Panel found Respondent’s testimony that he had no subjective intent to threaten criminal prosecution not to be credible, especially as he was unable to articulate any persuasive explanation of what other meaning or purpose his statement in the letter might have had.

(iii) the amount of actual or potential injury caused by the attorney’s misconduct;

Any economic injury caused by Respondent’s misconduct appears to have been minor. While the recipients of the letter did engage an attorney who, among other things, cautioned Respondent to temper his communications, it appears that they likely would have required legal representation in the underlying right-of-way dispute in any event. However, the Panel concludes that Respondent’s letter caused unwarranted distress to the recipients, and a loss of respect for the legal profession. The Panel is therefore unable to conclude that “little or no injury” occurred.

(iv) the existence of any aggravating or mitigating factors.

The Panel finds that aggravating factors present in this matter include Respondent’s initial lack of recognition of his misconduct, and his initial lack of remorse. As a mitigating factor, the Panel notes that Attorney Davis has no prior disciplinary record on file with the Board of Overseers of the Bar, and that in his testimony, he did express remorse for the misconduct. However, in light of Respondent’s initial difficulty in recognizing his violation of the Code of Professional Responsibility, the Panel is
unable to conclude that there is little likelihood that Respondent will repeat the misconduct in the future.

In view of the foregoing factors, the Panel concludes the appropriate sanction for Respondent’s misconduct is a public reprimand, in accordance with M. Bar R. 7.1(e)(3)(C). Accordingly, it is hereby ORDERED that Jed Davis, Esq., shall be, and hereby is, reprimanded for his violations of Maine Bar Rules 3.1(a) and 3.6(c).

Dated: December 30, 2008

Benjamín Townsend, Esq., Chair

William E. Baghdoyan, Esq.

David Nyberg, Ph.D.