This matter was before Panel E of the Grievance Commission on the petition of Bar Counsel alleging numerous violations of the Maine Bar Rules against the Respondent, John M. Whalen, in connection with his representation of the Maine Rural Workers’ Coalition (MRWC). On May 1, 2001, a public hearing was conducted to determine whether a bar rule violation had occurred and whether probable cause exists for the filing of an information pursuant to Maine Bar Rule 7.2(b).

At the hearing, the Board of Overseers was represented by Geoffrey Welch, Esq. Respondent was represented by Jennifer Ferguson, Attorney at Law.

The Board examined and Ms. Ferguson cross-examined the complainant, Jose Soto; Rebecca Webber; Audrey Morra; Paul Christian; John Whalen, Esq. Andrea Rodriguez and Mary Henderson. Mr. Whalen called and the Board cross-examined Andrea Rodriguez.

The Board offered into evidence Board Exhibits 1 through 47, which were admitted without objection with the exception of Board Exhibits 3, 4, 5, 8 and 31. Respondent’s Exhibits 13, 14 and 15 were substituted for the Board Exhibits 3, 4 and 8. Respondent’s Exhibits 1 through 15 were all admitted without objection.

Based upon the evidence, the Panel finds the Mr. Whalen has violated the Maine Bar Rules. For the reasons stated herein, it issues this public reprimand of Mr. Whalen.

Summary of Facts

In the fall of 1997, John M. Whalen, Esq. served as chair of the Social Justice and Peace Commission of St. Phillips Parish in Auburn, Maine. Mr. Whalen serves his parish and its Social Justice and Peace Commission as a volunteer. As such, Mr. Whalen learned of the efforts of Hispanic migrant workers employed by the Decoster Egg Farm to organize. That organization took the form of The Maine Rural Workers’ Coalition (MRWC). MRWC is lead by its director, Jose Soto. It is one of the few advocacy groups in Maine for Hispanic laborers. Its activity focuses upon fair employment practices, health insurance coverage and immigration issues. With Mr. Whalen’s assistance, MRWC aligned itself with St. Phillips. The church provided space to MRWC and served as a vehicle for MRWC to access grants available through various Catholic charities. One of several initiatives conceived for MRWC was a child care facility for the children of its
members/constituents. Mr. Whalen volunteered to provide legal advice to MRWC with respect to the formation of that day care facility, including the establishment of a tax exempt organization. Mr. Whalen worked hard and with a generous heart.

However, his conduct in the face of conflict between MRWC and St. Phillips – on the one hand, and between MRWC and its source of funding on the other, ran counter to the best interests of his client, MRWC and, thus, the bar rules.

At the outset, Mr. Whalen assembled a grant application to establish a day care center. Though MRWC was active in the organization of migrant workers, it had not developed procedures for handling the proceeds of grants. As a result, representatives of the Department of Human Services and of the charitable arm of the Catholic Diocese of Maine sought to assure themselves that money granted to MRWC was administered consistent with DHS regulations and in accordance with diocesan criteria. Mr. Whalen took exception to the procedures followed by Catholic Charities Human Development (CCHD) in applying its criteria and let his disdain for those procedures be known in a strongly worded statement to CCHD.

Ultimately, MRWC voted to abandon the child care grant application after it learned that the diocese had actually sponsored a competing application for the same DHS grant.

Mr. Whalen became frustrated by MRWC’s failure to satisfy CCHD criteria, as well as the perceived competition from Catholic Charities. These developments caused Mr. Whalen to resign both as counsel to MRWC and as Chair of the Social Justice and Peace Commission on April 15, 1998.1

Following his purported withdrawal, Mr. Whalen e-mailed CCHD representatives on April 28, 1998 and stated, among other things, that:

a. MRWC improperly segregated itself from the church community at St. Phillips, and wrongly looked at matters from only the vantage point of their limited self interest;

b. “Many people” actively questioned MRWC’s practice of taking a percentage of the recoveries DeCoster workers received from their lawsuits against their employer;

c. MRWC’s chairperson, Mr. Soto was not working to build community relations, but was seen as lining his own pockets from the misery of the DeCoster workers he claimed to represent.

See Board Exhibit 29.

The record reveals no authorization for a communication of this sort. Mr. Whalen characterized the e-mail as intemperate. It is more than intemperate. It is harmful to the reputation of MRWC and the relationships among MRWC, CCHD and St. Phillips. It is not clear whose interests Mr. Whalen intended to advance in his message. He clearly acted contrary to the best

1 The Board urged the Panel to conclude that Whalen, having undertaken the responsibility to complete the DHS grant application, violated the bar rules by withdrawing in the manner he did. In this aspect of the grievance, the Panel disagrees. The Panel notes that it was the MRWC membership who voted on April 13, 1998 to abandon the DHS application. The failure of MRWC to file a completed DHS application prior to an April 24, 1998 deadline cannot be attributed to Mr. Whalen. On the contrary, Mr. Whalen made it clear to all those involved that despite his decision to resign, he would do everything within his power to see that the process was completed on a timely basis.
interests of MRWC.

Thereafter, MRWC obtained substitute counsel, Rebecca Webber. On or about May 27, 1998, Attorney Webber wrote Mr. Whalen informing him that MRWC decided to appoint one person through whom all communications must run. This letter directed Mr. Whalen to run all of his communications by and through Mr. Soto until MRWC named another contact person.

In Mr. Whalen’s reply e-mail to Ms. Webber, he informed her that he would not agree to the restrictions placed on his speaking out concerning the MRWC.

In Ms. Webber’s follow up e-mail to Mr. Whalen of May 28, 1998, she repeated MRWC’s instructions to him that he not speak on its behalf without first going through MRWC’s contact person.

In Mr. Whalen’s second e-mail to Ms. Webber of May 28, 1998, Mr. Whalen stated that “stood by” his last correspondence to her and warned that “with my work for the church I am in frequent contact with the others. To date, my contact has allowed the space to stay available. I seriously feel if I indicate a reluctance to talk to them they will back away from supporting this project.” Mr. Whalen, thus, put himself squarely in the middle of a potential conflict between MRWC, as tenant, and St. Phillips, as landlord, - a conflict over which Mr. Whalen suggested he was in a position to exercise significant influence.

On or about May 29, 1998, Mr. Whalen, again, e-mailed Ms. Webber stating that:

a. In the last several months he had discussed with other members of the St. Philips’ Parish MRWC’s apparent wish to end its cooperative relationship with St. Philips;
b. MRWC had rejected every offer to work with St. Philips except to use the Church’s spaces;
c. He and others at St. Philips were concerned that MRWC had lost sight of the ecumenical spirit and purpose of MRWC and that instead MRWC wanted to create a separate community within St. Philips, which conduct constituted reverse racism; and
d. He discussed MRWC’s alleged improper relationship with St. Philips and that it appeared to the majority of the persons with whom he had considered matters that MRWC was working directly against church ideals.

See Board Exhibit 36.

On or about June 8, 1998, Mr. Whalen e-mailed Ms. Webber alleging that:

a. MRWC’s failure to adopt proper accounting and bookkeeping procedures had put the tax-exempt status of MRWC and that of St. Philips at risk;
b. MRWC chose to establish a segregated community instead of integrating itself with the St. Phillips community at large;
c. The practice of some MRWC and DeCoster workers of accepting free eggs from DeCoster was morally corrupt; and
d. He intended to ask St. Paul’s to revoke its earlier decision sponsoring MRWC.
See Board Exhibit 38.

Bar Rule Violations

Mr. Whalen’s manifest hostility towards MRWC, particularly his threats of eviction and his allusions to conversations with third persons on the subject of MRWC activity amounts to a fundamental breach of duty. As noted recently by the Maine Supreme Judicial Court, the primary duty of an attorney to his client is to conduct himself in a manner that is not “adverse” to his client. In re: Mangan, Supreme Judicial Court Docket No. Bar 99-5 (4/13/1080) citing Maine Bar Rule 3.4(b)(1).

Bar Counsels cites Bar Rule 3.1 and urges this Panel to conclude that Mr. Whalen’s conduct is “unworthy of an attorney.” The Panel agrees, mindful of the qualification in Rule 3.1 that nothing in the Code of Professional Responsibility is “intended to limit or supercede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation.”

As for specific rule violations, Bar Rule 3.4(b) contains the general admonition against conflicts of interest.

3.4(b) Conflict of Interest: General Provisions.

1) Basic rule.
A lawyer shall not commence or continue representation of a client if the representation would involve a conflict of interest except as permitted by this rule. Representation would involve a conflict of interest if there is a substantial risk that the lawyer’s representation of one client would be materially and adversely affected by the lawyer’s duties to another current client, to a former client, or to a third person, or by the lawyer’s own interest.

Mr. Whalen’s representation of MRWC was materially and adversely affected by what Mr. Whalen regarded as his duties to St. Phillip’s Church.

Maine Bar Rule 3.6(a) governs conduct during representation and requires that a lawyer “employ reasonable care and skill and apply the lawyer’s best judgment in the performance of professional services.” Mr. Whalen’s communications lacked judgment. They were polarizing, gratuitous and fulfilled no discernable purpose other than to embarrass MRWC.

Finally, Maine Bar Rule 3.6(h) prohibits a lawyer “without the informed written consent of the client” from revealing “a confidence or secret of the client to the disadvantage of the client.” Mr. Whalen’s e-mail correspondence is tantamount to an admission that he shared sensitive information pertaining to MRWC with third parties. He shared with representatives of CCHD, on April 28, 1998 scandalous allegations with respect to MRWC. On May 29, 1998, Mr. Whalen advised Ms. Webber that he had discussed matters pertaining to MRWC with members of St. Phillip’s Parish. The potential disadvantage to MRWC is clear from Mr. Whalen’s June 8, 1998 allusion to a course of action which would have removed MRWC from St. Phillip’s facilities and terminate the relationship.
Determination

Maine Bar Rule 7.1 provides that if the Panel finds that misconduct subject to sanction under these rules has occurred, the Panel may either dismiss the petition with a warning, issue a public reprimand, or direct Bar Counsel to commence an attorney discipline action. Dismissal with a warning is appropriate when the Panel concludes that the violation is minor, that there is little or no injury to a client, the public, the legal system or the profession, and that there is little likelihood of repetition by the attorney. The Panel finds that the misconduct cited above is, indeed, serious because Mr. Whalen’s communications carried with them the potential for significant harm to MRWC. Mr. Whalen offered no justification for his intemperate remarks and the record reveals no instance when such remarks were authorized by MRWC.

Giving due consideration to the fact that Mr. Whalen’s representation of MRWC was a charitable undertaking, that his initial motivation was to promote the social justice mission component of his church, and the absence of evidence that Mr. Whalen’s conduct actually harmed MRWC, this Panel reprimands John M. Whalen, Esq. for his violation of Maine Bar Rules 3.1(a), 3.4(b)(1), 3.6(a) and 3.6(h)(1) in connection with his representation of MRWC.

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Stephen G. Morrell, Chair Panel E

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Harriet Dawson

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Charles W. Smith Jr