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BOARD OF OVERSEERS OF THE BAR

GCF # 11-356; #11-386; #12-148

BOARD OF OVERSEERS OF THE BAR )  
 )  
 PETITIONER )  
 )  
 v. )  
 )  
 ANTHONY P. SHUSTA II, ESQ. )  
 of Madison, ME )  
 Bar #3424 )  
 )  
 Respondent )

**FINDINGS AND ORDER  
 OF PANEL D OF THE  
 GRIEVANCE COMMISSION  
 M. BAR R. 7.1 (E) (1)**

On April 2, 2013, with due notice, Panel D of the Grievance Commission conducted a public disciplinary hearing pursuant to Bar Rule 7.1 (e) (1) concerning misconduct by the respondent, Anthony P. Shusta, II, Esq. (Shusta). This disciplinary proceeding had been commenced by the filing of a Disciplinary petition by the Board of Overseers of the Bar (the Board) on September 4, 2012. At issue were three separate Counts: GCF #11-386, GCF #11-356 and GCF #12-148.

Present at the hearing were Bar Council J. Scott Davis, representing the Board, and Attorney Peter J. DeTroy, representing respondent Shusta.

The Parties' Joint Exhibits 1 through 30 were admitted without objection. In addition during the course of the hearing Exhibits 31 through 38 were admitted without objection.

The following witnesses testified at the hearing:

- Anthony P. Shusta, Esq.
- Assistant Attorney General Steven Parker
- Assistant District Attorney James Andrews
- Maine State Police Trooper Aaron M. Turcotte
- Maine State Police Trooper Peter Michaud
- Raymond Sheehan
- Laney Blyn
- Debbie A. Armiger (by phone)
- Attorney Philip Mohlar
- William Nugent, Director of the Maine Assistance Program for Lawyers

M. Bar R 2 (a) provides that the purpose of a bar disciplinary proceeding is not punishment, but rather the protection of the public from attorneys who, by their conduct, have demonstrated they are unable to properly discharge their professional duties. Among the factors to be considered are the duty violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, the existence of any aggravating or mitigating circumstances.

### **General Findings**

Having heard the testimony and reviewed the evidence submitted, the Panel hereby makes the following findings and conclusions concerning the Complaint's three Counts.

Respondent 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 and subject to the Maine Bar Rules and the Maine Rules of Professional Conduct. Shusta conducts his law practice as a sole practitioner located in Madison, ME.

The panel will discuss each of the Complaint's three Counts in their chronological order.

### **GCF #11-386: Shusta 11/29/2011 Guilty Plea to a Charge of Failing to Make Oral or Written Accident Report (Count II)**

On December 10, 2010 Shusta, driving alone, was involved in a single motor vehicle accident on Rt. 148 in Industry, ME. The accident occurred at approximately 9:00 p.m. Shusta had driven his Cadillac Escalade approximately 70 feet off the roadway and into a wooded area. The damage to the front end of the vehicle was extensive and would cost well above \$1,000 to repair.

Mr. Shusta used a passerby's cell phone to call Ray Sheehan, owner of Ray's Garage. Shusta had known Sheehan for many years. While Shusta waited for Sheehan's tow truck, a nearby resident named Blyn Laney offered to let him rest in his mother's house. As they walked to the house Shusta asked Laney if he had any "booze" in the house. When they arrived at the house Shusta proceeded to drink approximately 1/2 of a quart bottle of whiskey. Laney cautioned him about drinking whiskey after a crash and Shusta told him that he was a lawyer and knew the law and that he could take a drink. Shusta stated he paid Laney \$100 for the drink of whiskey because he felt he needed money. In his testimony to the Panel, Laney was clearly troubled by his responsibility in giving Shusta the whiskey.

When Sheehan arrived with his tow truck he inspected the Escalade and found that it had suffered substantial damage. Sheehan told Shusta he would not tow the vehicle unless a police officer was present. Shusta insisted that the police not be called. He kept telling Sheehan, over and over (perhaps 15 times), that he had drunk after the accident. When Sheehan told Shusta that if the police were not going to be called that he was going back to his shop, Shusta begged Sheehan to give him a ride home. Sheehan responded that Sheehan would be leaving the scene of

a crime and Shusta told him that was his choice. On the drive to Shusta's residence, Sheehan said Shusta was so drunk that he had to lock the passenger side door because Shusta kept falling over.

When Sheehan told Shusta he was going to call the police, Shusta told him "do whatever you've got to do." After leaving Shusta at his residence, Sheehan called the State Police.

In response, Trooper Turcotte arrived at the accident and inspected the crashed Escalade. He stated there was a strong smell of alcohol and suspected the operator had fled the accident scene in order to avoid an OUI charge. Turcotte's subsequent investigation included interviews with three persons who had witnessed Shusta near the time of the accident (before and immediately after). None stated they thought him to be intoxicated.

Shusta stated he had been going through a very painful and contested divorce. When his car went off the road and was seriously damaged, he thought that he "just didn't want to deal with it [the crash]." Also, in a December 23, 2011 letter to Bar Counsel Davis (Exhibit 18) due to his contested divorce he had a "desire to avoid personal confrontations." He also stated that: "By the time the wrecker arrived, I felt I would not be treated fairly by the police and decided it would be best to allow an attorney to handle the matter for me."

The State Police immediately attempted to talk to Shusta in his residence in Madison, ME. Despite multiple attempts to contact him (phone calls, messages, knocking on his door), Shusta refused to talk to the police. Shusta then hired attorney Philip Mohlar and asked him to contact the police.

Attorney Mohlar's investigation of the crash on behalf of Shusta was centered on evidence that could show Shusta had not been operating his vehicle under the influence of alcohol. Mohlar did state that in his experience it was not an unknown tactic for someone worried about a possible OUI charged to take a drink immediately *after* the accident had occurred. Eventually, on November 29, 2011 Shusta pled guilty to a Class E charge of Failing to Make Oral or Written Accident Report. He was fined \$1,000 and his driver's license was suspended for 30 days.

On November 29, 2011 Assistant Attorney General Steven A. Parker filed a grievance complaint with Board against Shusta. Parker filed this complaint when he became aware of Shusta's guilty plea and of the December, 2010 circumstances that gave rise to that plea.<sup>1</sup>

### **GPC #11-386 Conclusion: Public Reprimand**

The Maine Rules of Professional Conduct specifically require attorneys to uphold their responsibilities to clients and courts. In addition, under M. Bar R. 2 (a) and M. R. Prof. Conduct 8.4 Maine's professional conduct rules are applicable to Maine attorneys even if a client had not been harmed. This latter possibility is the one raised by GCF #11-386.

In this case Shusta actions were an intentional attempt to avoid his legal obligations when involved in a serious motor vehicle crash. While he was not charged with OUI his actions after

<sup>1</sup> Assistant District Attorney James Andrews, who assisted in preparing the Shusta arrest warrant, also drafted a grievance complaint. In an apparent error it was never sent to the Board.

the crash—heavy drinking, not reporting the crash to law enforcement, avoiding police inquiries—gave at least the appearance he was a lawyer scheming to avoid being charged with OUI. Further, his attempt to persuade Ray Sheehan to collaborate in his criminal refusal to report the crash potentially involved Sheehan in his illegal plan. Shusta's actions were in violation of the following provisions of M. R. Prof. Conduct 8.4:

(b) commit a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

The fact that Shusta was at that time engaged in the dissolution of his marriage does not mitigate the seriousness of his actions.

Pursuant to M. Bar R. 7.1 (e) (3) (C), for the above reasons the Panel finds that the appropriate disposition of GFC No. 11-386 is a **Public Reprimand**.

### **GCF # 11-356: Shusta 12/21/11 Guilty Plea to Driving Under the Influence (Count 1)**

#### **Findings**

On September 10, 2011 Shusta was charged with operating his vehicle under the influence (OUI). On that date, shortly prior to 6:30 p.m. different motorists had informed officials at the Gardiner toll booth of the erratic operation of a black Cadillac Escalade SUV. Shortly thereafter a Topsham police officer stopped that Escalade, operated by Shusta, for excessive speed and improper passing on Interstate 295. Shusta's blood alcohol level was found to have been .26.

On December 21, 2011 Shusta pled guilty to Class D OUI. He was fined \$640 and lost his license for 90 days. This OUI incident occurred 9 months after Shusta's failure to report the crash of his Escalade in Industry, ME.

As a result of his OUI charge, Shusta contacted Maxine Wolfe-Johnson, LADC, LSW, SAP, a substance abuse counselor, and in October, 2011 attended six one hour counseling sessions. Ms. Wolf on October 28, 2011 made the following conclusions as to his treatment:

Mr. Shusta has been fully engaged in the counseling process, and has been compliant with all requirements. He has demonstrated good insight and self-awareness. As of today, the treatment process is successfully completed and there are no further requirements or recommendations.

Hearing Exhibit #22.

At the Board hearing, Shusta testified that at the time of the OUI incident he had had been going through a very contentious separation and divorce proceeding. He stated that he and his wife have now reconciled and that he now drinks very little and does not drink when he will be driving.

By letter of November 3, 2011 with included documents, Assistant District Attorney (ADA) Patricia Madore, Maine Prosecutorial District VI, informed Bar Counsel of Shusta's then pending charge of criminal Operating Under the Influence of Intoxicating Liquor (OUI) in the West Bath District Court. As a result of ADA Madore's filing Bar Counsel initiated a *sua sponte* grievance against the respondent under M. Bar R. 7.1 (b).

### **GCF # 11-356 Conclusion: Dismissal with Warning**

The Panel realizes that pursuant to M. R. Prof. Conduct 8.4 (b) it is misconduct to commit a criminal act "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Shusta's OUI conviction did not directly affect his representation of a client's interest. Further, Shusta sought professional substance abuse counseling. The Panel is hopeful that this counseling will prevent Mr. Shusta from drinking and driving in the future. For these reasons the Panel is persuaded that Shusta's Class D OUI conviction did not constitute a major injury to the legal system or the profession.

Nonetheless, Shusta's .26 blood alcohol level and his erratic driving did indeed pose a threat to the public. Further, his OUI followed on his actions described in GCF 11-386, which also involved excessive drinking. the Panel hereby finds Shusta in violation of M. R. Prof. Conduct 8.4:

(b) commit a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

The fact that Shusta was at that time engaged in the dissolution of his marriage does not mitigate the seriousness of his actions.

For these reasons, pursuant to M. Bar R. 7.1 (e) (3) (B), the Panel finds that the appropriate disposition of GFC #11-356 is to issue to Attorney Shusta a **Dismissal with a Warning** against future drinking and driving.

The Panel recommends that Attorney Shusta consider making use of the Maine Assistance Program for Lawyers. We recognize that Attorney Shusta did seek help after the OUI but feel that more assistance may be helpful as mental health and substance abuse issues can recur.

## GCF #12-148: Use of a Non-Refundable Fee Agreement (Count III)

### Findings

On April 23, 2012 Debbie A. Armiger (Armiger) filed a grievance complaint against Shusta, her attorney. He was representing her in a grandparents' right case. In her complaint Armiger claimed that Shusta failed to communicate with her and charged her for services he did not perform.

Armiger initially hired and paid Shusta a "nonrefundable" \$1,000 retainer fee. Armiger lives in New Jersey and has never met Shusta in person. She initially agreed to the \$1,000 fee in a phone conversation with Shusta and then mailed him the money. Later she received in the mail an "Hourly Fee Agreement" for her signature which designated her initial \$1,000 payment as "nonrefundable." Paragraph 4 of this agreement reads in full:

4. The undersigned shall pay a non-refundable retainer of **\$1,000**. The retainer is non-refundable because it insures the services of this law firm and prevents this law firm from taking a provision adverse to the client. The Law Offices of Anthony P. Shusta II, shall initially bill for fees and expenses against the retainer, with bills provided to the undersigned to show the use of the retainer. When \$750 of said retainer is used, the undersigned shall replace said \$1,000 retainer to ensure payment of further fees and expenses. **This payment arrangement shall continue until the case is concluded.** In the event there is an outstanding balance, the balance will accrue interest at the rate of \$18 per year. If collection action is taken, client will be responsible for all fees and costs incurred.

Exhibit #27.

Armiger testified by phone that during the phone call Shusta had not told her that the \$1,000 was non-refundable or that Shusta's services would cost a minimum of \$1,000. Shusta admitted that it has long been his practice to charge his clients non-refundable retainers.

Shusta proceeded to send a letter to Armiger's son, the father of Armiger's grandchild. After the letter had been sent Armiger received from Shusta the Hourly Fee Agreement that stated the \$1,000 she had already paid was non-refundable. Armiger testified that she did not want to sign it but since thought she ought to since Shusta had already sent her son a letter. On 12/15/ 2011 she signed the agreement and returned it to Shusta.

In January Armiger began to leave phone messages for Shusta, attempting to end her employment of Shusta. She testified that she was not wealthy and that Shusta held her \$1,000 and all she had gotten out of it was a letter. Despite the fact that Paragraph 4 of the Agreement stated that Shusta would send Armiger bills that would show how the retainer was used, he did not do so. On January 28, 2012 she sent Shusta an email that read in part:

When we first spoke and you asked me for a retainer fee, you did not mention that it was "non refundable". I am sure the letter you wrote did not take long. Therefore I am expecting a check for my balance that you are holding. I never received any type of accounting to indicate my unused balance but I am sure it is substantial.

Exhibit #37.

In his testimony at the hearing Shusta confirmed that his work for Armiger consisted of the letter sent to her son and that this amounted to one billable hour at a cost of \$210.

Armiger several times a week made calls and left messages but she did not talk to Shusta until March 23, 2012. Armiger demanded back whatever was left of her \$1,000. She testified that Shusta was adamant that the fee was nonrefundable and that he told her it was because he had to retain her files for eight years. Eventually, he agreed to bargain as to how much should be returned and Shusta agreed to return to her \$400. Four weeks passed and she still had not receive the agreed upon \$400. Armiger's complaint to the Board was dated April 23, 2012. She complained to the Board because she believed Shusta was taking advantage of her. At approximately the same date as her complaint Armiger received from Shusta a check for the promised \$400.

#### **GCF #12-148 Conclusion: Public Reprimand**

The Panel finds that:

1. Shusta's \$1,000 retainer was defined in Armiger's Hourly Fee Agreement as non-refundable;
2. Shuasta failed to inform her before she tendered the money that the \$1,000 was non-refundable;
3. Shusta charged Armiger an unreasonable amount he when initially refused to return to Armiger the unused portion of that retainer. When Armiger continued to complain Shusta then agreed to return only \$400, with the apparent result that Armiger paid approximately \$600 for a letter that took approximately one billable hour of Shusta's time;
4. Shusta failed to provide Armiger with a bill for the letter he wrote on her behalf, despite the fact that his Hourly Fee Agreement required him to do so.

Shusta's requirement that Armiger pay a nonrefundable retainer resulted in numerous violations of the Maine Rules of Professional Conduct (MRPC). Specifically:

1. Rule 1.5 (a), which prohibits a lawyer charging a retainer that is non-refundable regardless the amount of work the lawyer performs (*see* Rule Comment—2009 (4): “A lawyer may require advanced payment of a fee, but is obliged to return any unearned portion.”);<sup>2</sup>

2. Rule 1.5 (a), which prohibits charging an unreasonable amount for expenses;

3. Rule 1.15 (b) (2) (iv) which requires a lawyer to promptly return to a client money which the client is entitled to receive; and

4. Rule 1.16 (d) which requires a lawyer upon termination of representation to refund “any advance payment of fees or expenses that has not been earned or incurred....”

In addition to the above MRPC violations, the Panel also finds that Shusta has violated Professional Misconduct Rule 8.4 (a) (violation of any MRPC) and (d) (conduct that is prejudicial to the administration of justice).

Pursuant to M. Bar R. 7.1 (e) (3) (C), for the above violations the Panel finds that the appropriate disposition of GFC No. 12-148 is to issue to Attorney Shusta a **Public Reprimand**.

Further, the Panel recommends that Shusta notify any client whose current Hourly Fee Agreement contains a nonrefundable retainer that all unearned fees will be refunded.

Dated: April 24, 2013

James A. McKenna  
James A. McKenna, Esq.

Mary A. Denison  
Mary Denison, Esq.

Emilie van Eeghen  
Emilie van Eeghen, Public Member

<sup>2</sup> See also Maine Board of Overseers of the Bar Opinion # 206: Non-refundable Flat Fee Agreements (December 12, 2012).