

STATE OF MAINE

BOARD OF OVERSEERS OF THE BAR

GCF No. 15-203

Board of Overseers of the Bar,)
)
 Petitioner)
)
 vs.)
)
 Richard A. Foley, Esq.)
 Of Augusta, Maine)
 Me. Bar #001804,)
)
 Respondent)

STIPULATED REPORT of FINDINGS
and DECISION of PANEL E of the
GRIEVANCE COMMISSION

On October 13, 2016, with due notice, Panel E of the Grievance Commission conducted a public disciplinary hearing pursuant to Maine Bar Rule 13(e)(7)(D) concerning misconduct by the Respondent, Richard A. Foley. The Board of Overseers of the Bar (the Board) commenced this disciplinary proceeding by its April 25, 2016 filing of a Disciplinary Petition.

At the October 13, 2016 hearing, the Board was represented by Deputy Bar Counsel Aria Ee and Attorney Foley appeared with his counsel, James M. Bowie, Esq. Prior to the hearing, the parties had submitted a Stipulated Proposed Sanction Report for the Grievance Commission Panel's review and consideration. Also prior to that hearing, Complainants Judith Shaw, Esq. Karla Black, Esq. and Carrie Carney, Esq. each were notified of the hearing date and provided with a copy of the proposed sanction report. Complainants Judith Shaw, Esq. and Karla Black, Esq. attended the October 13 stipulated hearing.

Having reviewed the agreed proposed findings as presented by the parties, the Panel makes the following disposition:

FINDINGS

Respondent, Richard A. Foley, Esq., was at all times relevant hereto an attorney duly admitted to and engaging in the practice of law in the State of Maine. As such, Attorney Foley was and remains subject to the Maine Bar Rules and the Maine Rules of Professional Conduct (MRPC). Attorney Foley practices law in a two person firm in Augusta, Maine. Based upon the stipulations by the parties, the Panel makes the following findings:

1. Richard A. Foley has been a member of the Maine Bar since 1955. He has no prior disciplinary or sanction record on file with the Board.
2. Attorney Foley provided professional services to a client, R.P., since the early 1970s. The services included representation of R.P., together with R.P.'s husband, who died in 2007. Over the years, Attorney Foley served as a "general counsel" to R.P., advising her with regard to her wills, a variety of real estate matters, and providing general advice to her with regard to her business affairs and estate planning.
3. For many years prior to May 2015, R.P. also received professional services from her financial advisor and/or his firm, both of whom are associated with Raymond James Financial Services.
4. In mid-2014, R.P. consulted with Attorney Foley regarding a variety of estate planning and financial questions. Part of R.P.'s discussion with

Attorney Foley concerned the amount of income she was receiving from her then-current investments.

5. As part of his consultation with R.P., Attorney Foley and his client decided that Attorney Foley would conduct a review of her investments. During the fall and early winter of 2014, R.P. discussed with Attorney Foley her thoughts as to the possible transfer of a portion of her assets. That discussion included R.P.'s desire to transfer some of her assets and a portion of her real estate to a man, not related to her, but whom she had known for many years. R.P. reported her desire to benefit him because of assistance he had provided to her over the years.
6. Based upon these communications, Attorney Foley provided a variety of advice to R.P., expressing his concerns about the wisdom of her transfer of her assets and also raising questions as to the appropriate management of her investment assets.
7. Following those discussions, Attorney Foley sought information and documents from R.P.'s financial advisor and others in order to assist her and provide advice with regard to her finances and estate planning.
8. Within that same time frame, Attorney Foley requested documents and specific changes to R.P.'s Raymond James accounts, including a request to delete R.P.'s niece as the P.O.D. on those accounts. The financial advisor complied with the requests for information and he sent Attorney Foley the necessary paperwork to be supplied to R.P. in order to effect the changes to the P.O.D. status.

9. The financial advisor informed R.P. in May 2015 that based upon the evolving situation, he felt compelled to no longer service her investment accounts. The Advisor's letter explaining that decision provided a sixty-day time frame wherein R.P. could seek assistance from another financial advisor or firm, or alternatively, to receive the investment funds via check for deposit at her subsequent convenience.
10. Attorney Foley and R.P. discussed her options with regard to the further handling of her investments, as well as a variety of potential real estate transfers and estate matters.
11. Thereafter, Attorney Foley arranged to have R.P.'s investments transferred to an online investment account. As part of that process, Attorney Foley assumed responsibility for the account, pursuant to a specific power of attorney (POA) form allowing him to act on R.P.'s behalf in the new investment account.
12. Throughout 2014 until early 2015, R.P. consulted with Attorney Foley regarding potential changes in her estate plan and possible transfers of real estate. As referenced earlier herein, Attorney Foley had provided advice with regard to R.P.'s estate planning since at least 1976, and had drafted a number of Wills and related documents for her over time since 1976. Based upon his conversations with R.P., Attorney Foley drafted a new Will for her which he executed on September 24, 2014. That Will provided, among other things, specific bequests to two persons, with the remainder of her estate to be distributed as follows: One third of the

remainder to R.P.'s niece, D.W., and Two-thirds of the remainder to the P Family Trust, for the benefit of R.P.'s step-daughter. The bequest to R.P.'s step-daughter was devised as part of a Special Needs Trust for the benefit of that disabled step-daughter. Attorney Foley drafted the Trust document and he and his law partner were named as Trustees. Attorney Foley was also named as Personal Representative and his law partner as Alternate Personal Representative in the 2014 Will.

13. Attorney Foley and his Assistant witnessed the 2014 Will.
14. A few months prior, in July 2014, Attorney Foley had prepared a "Financial Durable Power of Attorney" on behalf of R.P., designating Attorney Foley and his law partner as co-agents under that POA. The POA was a so-called "springing" Power of Attorney and would become effective upon R.P.'s incapacity as determined by a physician, attorney-at-law, judge or other appropriate government official.
15. The Financial Durable POA referenced in Paragraph 12 above included, *inter alia*, the ability of the holders of the POA to create trusts and to make gifts. That power also included the ability to make trusts and gifts that would benefit others including the holders of the POA.
16. Although the parties disagree about whether Attorney Foley informed third parties that he was R.P.'s agent under the POA, it is undisputed that the Financial Durable POA never became effective since R.P. was not declared incompetent to handle her financial affairs by a physician or anyone else. Moreover, Attorney Foley created no additional Trusts and

made no transfers to anyone utilizing the Durable POA. Likewise, Attorney Foley reports that at no time did he make any transfer of any assets of R.P. which were to the benefit of Attorney Foley and/or persons associated with him.

17. From 2007 through 2015, Attorney Foley charged R.P. for legal services that totaled \$8,930.75. He received payments from R.P. on nine separate occasions through March of 2015 totaling \$5,809.00, and as of August 4, 2015 he had an open balance from R.P. of \$3,304.35. R.P. discharged Attorney Foley on or about August 1, 2015.
18. Attorney Foley did not, at any time, have a written Fee Agreement with R.P. Since 1976 he has billed her on a roughly monthly basis over time, and those statements reflected legal services provided and increases in his hourly rate.
19. Attorney Foley, as her general counsel, charged R.P. for the time he spent consulting with her and assisting her with her financial affairs. From the time that R.P.'s financial advisor terminated her account in May of 2015 until Attorney Foley's services ended, Attorney Foley spent approximately 13 hours providing services relating to R.P.'s investments. He billed that time at \$175 per hour, resulting in charges of \$2,275.00 for those services.
20. Attorney Foley acknowledges that while he discussed the Financial Durable Power of Attorney with R.P. and provided her a copy, in hindsight he did not fully and completely describe the breadth of the

powers granted to him, including the breadth of the powers that would allow him to self-gift. He agrees that his failure to do so constituted a *per se* violation of M. R. Prof. Conduct 1.8(c).

21. Attorney Foley has represented that he believes his actions, regardless of the terms of the Financial Durable POA, were governed by his fiduciary and ethical obligations under the Maine Rules of Professional Conduct as well as by 18-A M.R.S. § 5914(a) which limits the agent acting pursuant to a POA to serve as a fiduciary to the Grantor of the Power of Attorney and to act in good faith and in accordance with the Grantor's reasonable expectations.
22. Attorney Foley acknowledges that he is bound by Rules 1.7 and 1.8, (conflicts of interests) and specifically the portions of those Rules dealing with his transactions that could implicate Attorney Foley's own personal interests in a way that is adverse to those of R.P., his client. While Attorney Foley did not solicit a gift from his client or prepare an instrument giving the lawyer a substantial gift, nonetheless the POA could be construed to have allowed Attorney Foley the power to make such a gift once the POA became effective. In so doing, Attorney Foley did not fully disclose and transmit in writing to R.P. the powers and transactions that she was granting him in a manner that could be reasonably understood by her, nor did he advise her of the desirability or opportunity for her to seek independent legal counsel with regard to that

transfer. Attorney Foley's failure in that regard constituted a violation of M. R. Prof. Conduct 1.8(a).

23. Attorney Foley also concedes that he relied upon his practice of sending periodic bills reflecting his services to R.P., but that he did not explain, specifically orally or in writing to R.P., the entire scope of his representation and the basis for his fees and expenses, except to the extent reflected in his bills. More particularly, he did not specifically advise R.P. that he would be charging her for the professional services he provided her with regard to her investments at his regular hourly rate. Attorney Foley agrees that his failure to do so constituted a violation of M. R. Prof. Conduct 1.2(a), 1.4 and 1.5(a)(b).

CONCLUSION AND SANCTION

The Maine Rules of Professional Conduct specifically require attorneys to uphold their duties to clients and the courts. Although the above-outlined conduct amounts to a violation of those Rules, the Panel notes that the purpose of bar disciplinary proceedings is not punishment, but rather the protection of the public. According to M. Bar R. 21(c), the various factors enumerated within the ABA "Annotated Standards for Imposing Lawyer Sanctions," should be assessed prior to imposing sanctions upon an attorney. Those factors include whether certain duties were violated, the lawyer's mental state, the actual or potential injury caused by the lawyer's misconduct, and the existence of any aggravating or mitigating circumstances. As referenced earlier

herein, Attorney Foley has no prior disciplinary or sanction history, which is credited as a mitigating factor. His former client, R.P., is a more vulnerable client than others who are not similarly-situated, which serves as an aggravating factor.

Despite those circumstances, there is no evidence on this record that Attorney Foley personally benefited from the actions he took on behalf of R.P., except to the extent that he billed her for the time he spent providing the 2014-2015 services. The Panel notes, however, that, Rule 1.8's limitations on an attorney seeking or acquiring an ability to personally benefit from a Power of Attorney, even though that power may not be exercised, requires that the attorney comply stringently with the requirements of that Rule. Attorney Foley concedes that he did not provide that communication to his client.

Similarly, Rule 1.5(b) requires that the attorney make clear the scope of the provided legal representation and the manner in which the attorney will be billing the client. In a case such as this, where Attorney Foley undertook to provide general advice to R.P. that had been previously provided to her by others, he was required to be specific in explaining to R.P. the services he would be providing at his regular hourly rate. Attorney Foley concedes that he failed to have a full and complete discussion of his billing with his client.

In sum, the evidence of misconduct supports the Panel's findings that Attorney Foley violated his obligations under Rules 1.5 and 1.8 to his client, R.P. Attorney Foley reports that those violations were inadvertent. The Panel makes no determination whether R.P. suffered any pecuniary loss (other than

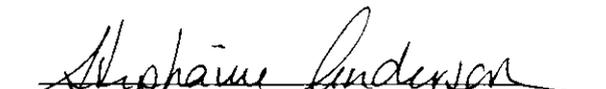
having been billed for attorney's fees) as a result of Attorney Foley's actions. Based upon his admissions, the Panel finds that there is little likelihood of repetition of the behavior by Attorney Foley. However, given the absolute prohibition against self-dealing between an attorney and a client except by stringent compliance with Rule 1.8, the Panel cannot find that Attorney Foley's violations and resulting misconduct were minor. Accordingly, the Panel concludes that a reprimand is the proper sanction to impose upon Attorney Foley.

Therefore, the Panel accepts the agreement of the parties and concludes that the appropriate disposition of this case is the issuance of a Public Reprimand, which is now hereby issued and imposed upon Richard A. Foley, Esq., pursuant to M. Bar R. 13(e)(10)(C) and 21(b)(5).

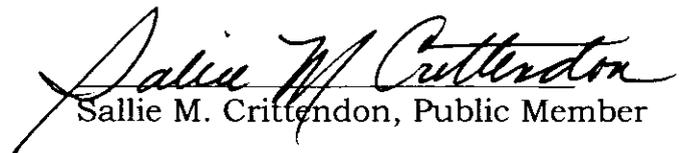
Date: 10/23/16



David S. Abramson, Esq., Chair



Stephanie P. Anderson, Esq.



Sallie M. Crittendon, Public Member