

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. Bar 00-3

BOARD OF OVERSEERS OF THE BAR )
v. )
L. JOHN CASTNER, ESQ. )

DECISION AND ORDER

L. John Castner, a member of the Maine Bar who has been the subject of an investigation by the Board of Overseers of the Bar, has tendered his resignation from the Bar. The Board has forwarded that tender to this court along with its unanimous recommendation that the court accept the resignation. Accompanying the Board's filing is Castner's affidavit required by M. Bar R. 7.3(g)(1). Castner's resignation is the result of his admission that he violated several Bar rules in the course of his financial dealings with an elderly client.

The family of the elderly client (she is now deceased) has moved to intervene in the proceedings for the limited purpose of augmenting the record regarding Castner's misdeeds. Specifically, the family is concerned that the rule requiring Castner's affidavit to be kept under seal, M. Bar R. 7.3(g)(3), will prevent the court from understanding the full nature of Castner's actions. The family does not, however, oppose the resignation.

A hearing was held at which the Board was represented by Attorney Karen Kingsley, Castner was represented by Attorney Kenneth Clegg, and the Fosters were represented by Attorney James McNiff II. Castner and

Jonathan Foster were both present. Except for brief questioning of Castner by the court, no testimony was presented. The court heard at length from Attorney McNiff and briefly from Jonathan Foster. Attorneys Kingsley and Clegg also spoke briefly. For the reasons set out below, the petition for extraordinary relief is granted in limited form: the court has undertaken an *in camera* review of the Fosters' statement under seal. L. John Castner's resignation is accepted by the court.

### I. BACKGROUND

Castner is a sixty-eight-year-old graduate of Bowdoin College and Portland University.<sup>1</sup> He passed the Bar in 1957 and was admitted to practice in August of that year. He has been engaged in the practice of law since then, with the exception of a brief hiatus during the 1960s. In recent years, he has practiced as a solo practitioner in South Berwick. His practice has dwindled over the last several years, and he represents to the court that he is, for all practical purposes, retired. He has not been the subject of any disciplinary proceeding prior to the one at bar.

In the late 1980s, Castner became acquainted with an elderly woman named Juliette Worster. He represented her as the personal representative of her deceased sister's estate and became extensively involved in Worster's own estate planning and finances.

After Worster died, a dispute arose between Castner and Jonathan and Philip Foster, relatives of Worster who became the personal representatives

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1. The background has been taken from Castner's affidavit which has been reviewed and approved by the Board, from Castner's statements (not under oath) at the hearing, from the arguments of counsel, and from the pleadings of the parties.

of her estate. The gravamen of the dispute centered on allegations that Castner had abused his position of trust with Worster and had thereby misappropriated her property. Eventually, the parties entered into a comprehensive settlement. Both Castner and the Fosters were represented by counsel throughout the negotiations and in entering into the settlement. The settlement was finalized on June 9, 2000. It contained a confidentiality clause prohibiting the Fosters from disclosing matters related to their dispute with Castner, unless compelled to do so by a lawful order of the court.<sup>2</sup> The Board of Overseers of the Bar was neither a participant in, nor a signatory to, the settlement agreement. The agreement recognized that Castner “will attempt to reach an agreed on disposition of the disciplinary proceeding presently pending against Castner before the Board of Overseers of the Bar.”

## II. PROCEDURAL HISTORY OF THE CURRENT PROCEEDINGS

Castner and the Board did reach an agreed upon recommendation to the court.<sup>3</sup> Three months after the parties had settled their dispute, the Board forwarded to the court Castner’s resignation along with its own unanimous recommendation that the court accept the resignation.

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2. The Fosters also agreed that “they will take no position and make no comment for or against any effort to obtain a court order, the outcome of which would cause the disclosure of any information subject to this confidentiality agreement”; that they would “not now or at any time in the future seek, solicit or in any way encourage the criminal prosecution of Castner nor will they make any new or additional complaints to any disciplinary authority pertaining to Castner and his involvement with Juliette C. Foster and/or her Estate”; and that they “will not express any opinion or make any statement to any Judge, prosecuting authority or disciplinary body concerning any sanction, punishment or sentence which may subsequently be assessed, imposed, or otherwise levied against Castner . . . .”

3. Any such agreed recommendation is always subject to the approval or rejection of the court. M. Bar R. 7.3(g)(2).

Shortly thereafter, Attorney McNiff, on behalf of Jonathan and Philip Foster, filed a petition for extraordinary relief “for the limited purpose of introducing into the record . . . their written statement of what they believe to be the facts underlying their recent settlement of all claims against L. John Castner, Esq.” In essence, the Fosters sought to have the court compel them to disclose that which they had bound themselves not to disclose in the settlement agreement. They included with their petition a document under seal setting out the facts that they believe the court should be aware of in making its decision on the pending proposed resignation. In their petition, the Fosters specifically asserted that they are “not urging any particular sanction or disposition.”

Both the Board and Castner opposed the Fosters’ petition, and the Fosters filed a lengthy reply, augmenting their argument that resignation pursuant to Rule 7.3 is not available to Castner and that the Maine Bar Rules’ provision regarding the sealing of the resigning attorney’s affidavit is outmoded. A hearing was held on December 6, 2000. At the hearing, the Fosters confirmed that they do not oppose Castner’s resignation from the Bar. Rather, they seek only to augment the record regarding Castner’s misconduct. Although they would prefer that the court compel them to release the information so that it will be a part of the public record, they indicated through counsel that they would be satisfied with the court’s *in camera* review of the documents they had submitted under seal.

### III. DISCUSSION

#### A. Application of Rule 7.3(g)

Preliminarily, I reject the Fosters' argument that, because the matter had already proceeded to a probable cause finding pursuant to Rule 7.1(d), Castner may not tender his resignation pursuant to Rule 7.3(g). The phrase used in Rule 7.3(g) "[a]n attorney who is the subject of an investigation under these rules," upon which the Fosters' argument rests, was not intended to distinguish between different phases of a disciplinary proceeding. Indeed, Rule 7.3 provides the only procedure under which an attorney who is the subject of any disciplinary action by the Board may resign from the Bar.

I also find the Fosters' argument regarding the wisdom of impounding the resigning attorney's affidavit pursuant to Rule 7.3(g)(3) to be unavailing. The rule currently in effect in Maine requires the impoundment. M. Bar R. 7.3(g)(3). Arguments that the rule should be amended prospectively may have sound reasoning behind them, but are of no efficacy here.<sup>4</sup>

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4. The Fosters filed extensive arguments on this issue and included as exhibits excerpts from a 1970 report of the American Bar Association entitled "Problems and Recommendations in Disciplinary Enforcement," and excerpts from the ABA's 1992 Report on the Commission on Evaluation of Disciplinary Enforcement, entitled "Lawyer Regulation for a New Century." The reports demonstrate an emerging philosophy that there should be greater public disclosure of and access to disciplinary proceedings in order to foster greater public trust in the system of lawyer discipline. The current Maine Bar Rules balance the competing interests—obtaining swiftly and at the least cost the resignation of an attorney who should not be practicing law, and the public's need to have full disclosure of the details leading to the resignation—by impounding the attorney's own affidavit but making public the court's final order accepting the resignation. Changes in that balance must be made through an amendment to the rules.

## B. Augmenting the Record

At the outset, it should be made clear that the Fosters were given a full opportunity to speak during the hearing and to provide the court with whatever information they chose. This court treated the matter as loosely analogous to a criminal sentencing, with the Fosters standing in the position of the victim. Neither the court nor the Board prevented the Fosters from offering whatever information or documents they deemed pertinent to the court's decision. Thus, it was the Fosters' own decision to enter into the settlement agreement and their concerns about the private consequences of breaching that agreement that prevented their straightforward presentation to the court in this matter.<sup>5</sup>

Moreover, it is not entirely clear what the Fosters are actually seeking from this court. Although they argue that the rules do not permit Castner to use Rule 7.3 to resign, they also assert that they do not object to his resignation.<sup>6</sup> The Fosters' only requested relief is set forth in the alternative on page twelve of their petition: the entry into the record, in one form or another, of their attorney's affidavit filed under seal with the court. In other words, notwithstanding their agreement with Castner, they

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5. At the hearing, Attorney McNiff argued that the Fosters were surprised by the agreed upon resignation recommendation. McNiff argued that the Fosters were misled by a letter from the Board, following the probable cause hearing, setting out the next anticipated steps in the disciplinary procedure. That letter was sent to the Fosters on April 20, 2000. The settlement agreement was entered into on June 9, 2000. Given the settlement agreement's explicit recognition that Castner would be attempting to reach an agreed upon resolution with the Board, the current proceedings were clearly within the contemplation of the parties at the time they entered into the agreement.

6. The Fosters apparent objection to the Rule 7.3(g) procedure is the impounding of the resigning attorney's affidavit.

now wish to augment the court's record regarding the nature of Castner's misdeeds.

In the context of the settlement agreement, the Fosters received substantial financial remuneration from Castner. They do not claim that they have not been made whole. Were the Fosters' interests the only interests at stake here, the court would conclude that the settlement agreement and Castner's resignation from the Bar would be fully sufficient to protect those interests. There is more at stake, however, than the Fosters' interests alone. The interests of the public must be considered. Ultimately, because of the overarching responsibility of this court to the public, I have concluded that the Fosters' statement must be reviewed *in camera* to determine (1) whether its contents would cause me to consider rejecting Castner's voluntary resignation from the Bar or (2) whether its contents should be compelled to be released publicly. Therefore, I have reviewed the documents provided under seal, as requested by the Fosters.<sup>7</sup>

The documents submitted by the Fosters under seal include the affidavit of Attorney McNiff, along with a series of exhibits, at least two of which are public records. The affidavit tracks the history of the dispute between the Fosters and Castner and relates in specific detail the steps and discussions of the settlement negotiations between the parties and their counsel. In particular, it sets out Attorney McNiff's thought processes and

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7. In so doing, I have neither compelled their production, nor required their release in any fashion. At the hearing, with the parties agreeing that the provision of the materials to counsel for Castner would not constitute a breach of the agreement, the Fosters provided a copy of the sealed documents to Castner's attorney at the court's request. The court understands that the Fosters also provided a copy to counsel for the Board.

actions in the course of those negotiations. It also sets forth Attorney McNiff's understanding of the history of Juliette Worster's relationship and financial interactions with Castner as well as his understanding of the dismay and distress suffered by his clients during the process of resolving the dispute.

The contents of the McNiff affidavit are fully consistent with Castner's final resignation from the Bar. The only remaining question then is whether the court should compel the public release of the sealed documents. A review of the important public interests at stake lead the court to conclude that no such order to compel is justified.

Because the Bar rules are intended to protect the public, not to punish or humiliate attorneys, this court must reject any effort to augment the record based solely on a desire to achieve further public excoriation of Castner. See M. Bar R. 2(a). Nonetheless, this court does not treat lightly the Fosters' concerns that the public may be ill served by a process which allows an attorney who has been under investigation to resign without the creation of a meaningful record of the factual background resulting in the resignation. The public's interests take several forms in the context of this proceeding.

#### 1. Prospective Clients

Rule 7.3(g) is written with the evident intent of protecting prospective clients of a resigning attorney should that attorney seek readmission to the Bar. See M. Bar R. 7.3(g). In the absence of a clear written record of the reasons for the resignation, an attorney could be

inappropriately readmitted to practice or readmitted without sufficient safeguards for the public. That concern is not applicable to the facts before the court.

Castner is sixty-eight years old. He has retired from practice and has assured the court that he will never again attempt to become a member of the Bar. Because Castner will not practice law again, there is no risk to the public that his impounded affidavit is insufficiently detailed to protect prospective clients should he seek reinstatement. In addition, the Castner affidavit has been reviewed by this court and does contain sufficient detail to apprise a future court of the nature of Castner's misconduct should the unexpected come to pass. Furthermore, any court asked to consider a request for reinstatement will be aware, through the contents of this order, of Castner's representations to this court that he does not intend ever to practice law again.

## 2. Protection and Recompense for Victims

The Bar rules are also generally designed to protect the attorney's current clients as the victims of the misconduct. The Fosters, standing in the shoes of Worster, had ample opportunity to present their claims to the Board and entered into a comprehensive settlement of their financial claims against Castner. They do not assert that any other action need be taken on their behalf. Thus, further public augmentation of the record will serve no purpose in protecting the Fosters.

### 3. Other "Unidentified" Victims

It is on behalf of the possible unidentified victims of other unrevealed misconduct that the Fosters assert the court must act.<sup>8</sup> Specifically, they "raise questions of whether or not further investigation of Castner is called for and whether or not charges should issue under any one or more of several Maine criminal statutes."

The specific body charged by the court with the oversight of the profession is the Board of Overseers of the Bar. The Board represents that it is well aware of the Fosters' concerns in this regard. Further, the Fosters had ample opportunity to make all of their concerns and facts known to the Board. If further investigation regarding other clients is necessary or appropriate, the Board may take that action. The Board may also make any referral to a law enforcement agency that it deems appropriate. M. Bar R. 7.3(k)(4). In the context of this disciplinary proceeding, publicly augmenting the court's record to include Attorney McNiff's understanding and conclusions regarding the specifics of Castner's misconduct relating to Worster will not advance that cause.

### 4. The Public's Confidence in Bar Discipline Proceedings

An underlying concern in any Bar disciplinary proceeding must be the public's confidence in the Bar discipline process. Here, the Board of Overseers of the Bar acted appropriately to investigate the Fosters' allegations regarding Castner's misconduct. Castner has now tendered his

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8. The McNiff affidavit briefly references another now deceased client of Castner. The personal representatives of her estate are represented by Attorney McNiff who indicates that those matters are proceeding separately in Probate Court.

resignation from the Bar. He will not practice law in this state again. The Fosters have been made whole through their settlement agreement. The nature of Castner's misconduct, as well as his representation that he will not ever request readmission to the Bar, are reflected in this order, which is a public document. Attorney McNiff's recitation of his understanding of Castner's financial misdeeds would merely gild the lily. Such a purpose does not warrant the exercise of the court's authority to circumvent the agreement of the parties.

### III. CONCLUSION

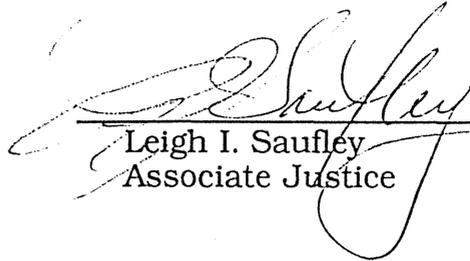
L. John Castner has admitted that he engaged in serious violations of the Maine Bar Rules. He has tendered his resignation from the Bar. He has told the court that he will not attempt to engage in the practice of law again. He has compensated the relatives of Juliette Worster and has resolved any disputes with her heirs through a settlement agreement. The court has reviewed the Castner affidavit, the McNiff affidavit, and the unanimous recommendation of the Board that the resignation be accepted.

The court accepts the resignation of L. John Castner from the Maine Bar. The court has granted the petitioners' motion for *in camera* review of the McNiff affidavit and exhibits. To the extent that the petitioners also request an order compelling them, contrary to the terms of their settlement agreement with Castner, to publicly release those documents, that request is denied. Pursuant to the requirements of Rule 7.3(g)(3), the affidavit of L. John Caster shall remain impounded. The affidavit of James McNiff II submitted under seal shall remain under seal. In the unanticipated event

that Castner applies for reinstatement to the Bar, the court may, in its discretion, order the release of either or both affidavits.

This order shall be a matter of public record, pursuant to Rule 7.3(g)(3). Castner shall comply with the requirements of Rule 7.3(i).

Dated: January 5, 2001



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Leigh I. Saufley  
Associate Justice

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