

Board of Overseers of the Bar

GRIEVANCE COMMISSION

File No. 06-259; 07-312

BOARD OF OVERSEERS OF THE BAR,

Petitioner,

v.

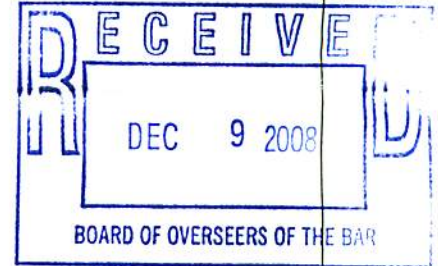
THOMAS HALLETT, ESQ. ,

of PORTLAND, Maine

Bar #3142,

Respondent

DECISION AND ORDER



Pursuant to Maine Bar Rule 7(e), and with due notice, a hearing was held in Portland, Maine on November 20, 2008 before the undersigned members of the Grievance Commission. The Board of Overseers of the Bar was represented by Bar Counsel Scott Davis, Esq. Respondent was represented by Peter DeTroy, Esq. The panel selected to hear this matter is comprised of attorney Maurice Libner (Chair), attorney Martica Douglas, and lay member, Susannah White.

The subject of the hearing was a Disciplinary Petition dated July 1, 2008, asserting two counts against the Respondent attorney. Count I asserted that Respondent transgressed Maine Bar Rules 3.1(a), 3.2(f)(4), and 3.7(a) during the course of litigation originating in Maine's federal district court, captioned Roger Edwards, LLC v. Fiddes & Sons, Ltd. United States Magistrate Judge David Cohen found that Respondent's unsuccessful Rule 60(b) motion to set aside a judgment violated F.R.Civ.P. 11(b). That rule forbids attorneys from filing pleadings for any improper purpose, that are frivolous, or are without actual or potential factual support. His order was

1 affirmed on Respondent's appeal to the First Circuit, which also found the appeal to violate
2 F.R.A.P. 38.

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4 Count II of the Disciplinary Petition charges that Respondent attorney violated Maine Bar Rules
5 3.1(a); 3.2(f)(4); 3.7(a); 3.13(a)(1), (2), (3)(i) and(ii)¹ in another, unrelated case, involving a
6 mental health counselor named Steven Danzig. At a period of time when Respondent was the
7 exclusive owner of his law practice, an associate attorney he employed named Michael Whipple
8 requested Mr. Danzig's treatment records for one of his clients, to use in an upcoming sentencing
9 hearing. Danzig and Whipple were in disagreement over what was reasonable compensation for
10 furnishing these records, with the result that Danzig received no payment at all.

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13 The panel considered testimony by three witnesses: Respondent, Steven Danzig, and Michael
14 Whipple. The panel also received without objection 16 Exhibits offered by Bar Counsel, and 8
15 Exhibits offered by Respondent. (Due to the confidential nature of Respondent's Exhibit #8, the
16 medical records at issue in Count II, it was stipulated that this document would be returned to
17 Respondent following this decision.)

18
19 With respect to the charges in Count I, the panel concludes that Respondent should be
20 reprimanded for violating Maine Bar Rules 3.1(a) and 3.2(f)(4). However, we find that Rule
21 3.7(a) was not violated. Regarding Count II, the panel concludes that there was no violation of
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25 ¹ During the hearing, the parties agreed that the charge against Respondent also entailed a violation of Rule 3.13(c),
and this was accordingly tried without objection.

1 any Bar Rule, and that the charge should be dismissed. Our reasoning leading to these
2 conclusions is explained in the following paragraphs.

3
4 COUNT I

5 The litigation underlying the charges in Count I ensued following the collapse of a commercial
6 relationship between Respondent's client, Roger Edwards, LLC ("Edwards") and Fiddes & Son,
7 Ltd., ("Fiddes") a British manufacturer of wax products. The original suit sought damages
8 exceeding one million dollars from Fiddes for the alleged breach of an exclusive distributorship
9 contract for Briwax, a Fiddes product. Fiddes counterclaimed for the price of products that
10 Edwards received but had not paid for.

11
12 Respondent Hallett and his law firm did not represent Roger Edwards, LLC until after discovery
13 was finished. Respondent's client, Roger Edwards, LLC, was owned by Larry Mann, who hired
14 Hallett in December 2004 to defend Fiddes' summary judgment motion. Fiddes was awarded
15 partial summary judgment, and the remaining issues in the case were tried by jury, resulting in a
16 verdict favorable to Fiddes on all counts, including a monetary award for the counterclaim.
17 Edwards appealed to the First Circuit, which ultimately sustained the judgment of the lower
18 court. Board Exhibit #3

19
20 During the pendency of this first of its three appeals, Respondent moved to reopen the judgment
21 of the trial court under F.R.Civ.P. 60(b), alleging that Fiddes had defrauded Edwards and the trial
22 court by mislabeling Briwax and by offering false evidence regarding the legal sufficiency of the
23 product labeling. Magistrate Cohen denied the Rule 60(b) motion, holding that the product
24 labeling was apparent to Edwards from the outset of the litigation, whose failure to raise this
25 issue earlier in the litigation was not caused by any misconduct of Fiddes and which, in any

1 event, did not affect the outcome of the case. Board Exhibit #5. The District Court subsequently
2 granted Fiddes' motion for its legal fees and costs in defending the Rule 60(b) motion, which the
3 District Court held violated F.R.Civ.P. 11. Board Exhibit #16

4
5 Edwards separately appealed the denial of its Rule 60(b) motion and the award of *sanctions* to
6 the First Circuit, giving rise to a total of three different decisions from that court. Board Exhibits
7 #1 and 4. As indicated above, the First Circuit not only upheld the original award of Rule 11
8 sanctions, but imposed further sanctions under F.R.A.P. for the two final appeals. Board Exhibit

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11 Respondent testified with candor that he “crossed the line”, allowing his professional objectivity
12 to fall victim to unbridled advocacy demanded by his client. He admitted that Larry Mann was
13 probably motivated at least partly by a desire to inflict financial damage on Fiddes when Mann
14 furnished him with a lengthy affidavit by a newly discovered expert on the issue of product
15 mislabeling. (Mann and/or Respondent furnished the United States Department of Transportation
16 with this same information, in hopes of getting Briwax banned from interstate commerce in the
17 alleged interest of “public safety”. Mann urged Respondent to use the new labeling information
18 to reopen the adverse judgment. Respondent testified that he accommodated these requests in
19 hopes of obtaining a new trial, not for the mere purpose of damaging Fiddes by disparaging its
20 product or frivolously dragging out the litigation. Having reviewed Respondent’s substantive
21 briefs at trial and on appeal of the Rule 60(b) motion, the panel is satisfied that Respondent’s
22 subjective intent was never malicious. Therefore, we decline to find a violation of Bar Rule
23 3.7(a).

1 However, the Rule 60(b) motion and Respondent's final two appeals constituted conduct
2 "prejudicial to the administration of justice" (M.B.R.3.2(f)(4)) and "conduct unworthy of an
3 attorney" (3.1(a)), for reasons best summarized by the final court of appeals decision, Bar
4 Counsel Exhibit #1, pp. 9-11:

5
6 "So what we have are highly dubious charges of fraud which, in any event, are not
7 effectively connected to any plausible showing of the necessary prejudice. No reasonable
8 lawyer considering a Rule 60(b) motion could suppose that such a combination had any
9 chance of upsetting a final judgment reached after extensive litigation....

10 We think that sanctions in this court are also appropriate. To the extent Roger Edwards'
11 brief on appeal added to arguments made in the district court...(it) had no reason to think
12 that these new arguments were preserved ...to the extent the arguments were the same,
13 Roger Edwards' insistence on rehashing its meritless claims yet again represents just the
14 sort of vexatious behavior that Rule 38 is meant to discourage." (citations omitted)

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16 We need not decide whether every violation of F.R.Civ.P. 11 or M.R.Civ.P. 11 is *per se* a
17 violation of the Maine Bar Rules. In this case, substantial judicial resources were expended to
18 defend Respondent's litigation tactics, found to be frivolous both by the trial and the appellate
19 courts. Respondent does not ask the Board to revisit these findings, and we decline to do so. This
20 type of behavior not only needlessly aggravates and unfairly harms the opposing party, but also
21 impairs the courts' ability to efficiently ration justice to the public by wasting scarce judicial
22 resources. In sum, we find Respondent's conduct sufficiently egregious in scope, duration and
23 persistence to warrant a formal reprimand.

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1 COUNT II

2 Respondent's associate counsel, Michael Whipple, requested a client's treatment records from
3 Stephen Danzig, a mental health and substance abuse counselor, to be used in an upcoming
4 sentencing hearing. In a letter to Danzig, Whipple's paralegal promised to pay Danzig's
5 "reasonable expenses" for these records. Bar Counsel Exhibit #8. In reply, Danzig declined to
6 release the records unless his patient's \$40 unpaid treatment charges were first paid. Bar Counsel
7 Exhibits #9,10. Whipple inferred that Danzig expected his office to pay for the client's treatment
8 before the records would be released, which could violate Maine Bar Rule 3.7(d).

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10 Whipple then served a subpoena duces tecum on Danzig at his office, compelling the client's
11 medical file to be produced for inspection in Portland, a half-hour drive for Danzig. Whipple did
12 not tender any fee for attendance or mileage, in violation of 16 M.R.S.A. § 251. Danzig
13 responded to the subpoena by mailing a copy of the records (six pages) to Whipple with a bill for
14 \$90.00. Whipple disregarded the invoice, two later faxes of the same bill, and repeated telephone
15 calls to the office by Danzig's wife/bookkeeper. As of the hearing date, Danzig had not been paid
16 anything for providing these medical records to Respondent's firm.

17
18 During the course of the hearing, Danzig was asked by counsel for Respondent to explain how
19 he arrived at the charge of \$90 for providing six pages of medical records. Danzig testified that
20 he had to drive one hour to get the records at a "remote storage site", which on further
21 questioning turned out to be his home. Danzig was unable to offer a cogent explanation of why
22 he would be justified in billing at a professional hourly rate in bringing records from his home to
23 his office to be copied and mailed.

1 Rule 3.13(a) provides that a partner in a law firm shall make reasonable efforts to ensure that the
2 firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to
3 the Code of Professional Responsibility. Associate attorney Michael Whipple was an
4 experienced attorney at the time of these events. He had his own case load, and worked on the
5 subject case without direct supervision by Respondent. Rule 3.13(a) does not require a partner to
6 supervise every detail of each case assigned to an associate attorney. Danzig and Whipple should
7 have resolved the billing dispute with a phone call and common courtesy. It is unrealistic to
8 expect the managing owner of the law firm, in this instance, to be aware of every disagreement
9 over accounts payable that may arise from the caseload of an associate attorney, and therefore we
10 decline to hold Respondent liable for violating Rule 3.13(a).

11
12 It is undisputed that Respondent had no knowledge of the conflict between attorney Whipple and
13 Danzig before he received Danzig's complaint to the Board of Overseers of the Bar. The
14 remaining Bar Rule violations alleged by Bar Counsel are predicated on Respondent's actual
15 knowledge of prohibited conduct. For example, Bar Rule 3.13(a)(3) makes a partner or
16 supervisory lawyer responsible for another lawyer's violation of the Code of Professional
17 Responsibility if:


- 18 “(i) the lawyer orders or, *with knowledge of the specific conduct*, ratifies the conduct
19 involved; or
20 (ii) the lawyer is a partner in the law firm, in which the other lawyer practices, or has
21 direct supervisory authority over the other lawyer, and *knows of the conduct at a time*
22 *when its consequences can be avoided or mitigated* but fails to take reasonable remedial
23 action.” (Emphasis added)

24 Similarly, Rule 3.13(c) requires knowledge on the part of a lawyer charged with responsibility
25 for non-lawyer misconduct. Since Respondent never had knowledge of any conduct alleged to be

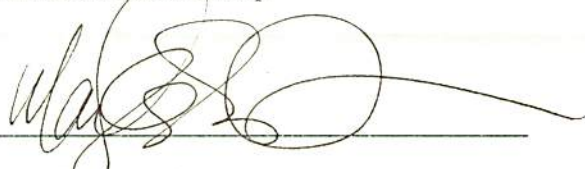
1 prohibited by these Bar Rules, he cannot be held responsible for any infraction. Neither do we
2 find any of the other rules cited by Bar Counsel a basis for disciplinary action against
3 Respondent.

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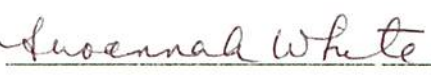
Dated: 12/1/08


Maurice Libner, Esq.

Nov. 25, 2008


Martica Douglas, Esq.

November 28, 2008


Susannah White