STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. BAR-13-11

BOARD OF OVERSEERS OF THE BAR
Plaintiff

v. Findings, Conclusions and Order

CHARLES T. FERRIS, ESQ.
Me. Bar #7550
Defendant

This matter is before the Court for decision after hearing conducted at the Lewiston District Court on January 21, 2014. In this proceeding and at the hearing, the Board of Overseers was represented by Bar Counsel J. Scott Davis; Charles T. Ferris was represented by Attorney Peter J. DeTroy.

Proceedings before the Board of Overseers had been initiated by separate grievance complaints filed in March 2012 by Attorney Julian Sweet and Attorney Sarah Mitchell. After initial proceedings, but no final resolution, before a panel of the Grievance Commission, the parties elected to bring the matter directly before the Court by a Stipulated Waiver of Grievance Commission Proceedings, M. Bar R. 7.1(e), 7.2(b), dated May 15, 2013, approved by the Court on June 7, 2013. After the Court's approval, the Board of Overseers of the Bar filed a Stipulated Information and draft Order and Decision for the Court on September 25, 2013.

The Court's findings, stated below, are based on these stipulated documents, the testimony received at hearing, and 34 exhibits that were admitted by agreement. The Court has also considered the written arguments filed by each party and the closing arguments presented at the conclusion of the evidence.

The parties have stipulated to the facts that led to the two grievance filings and stipulated to a finding that those facts constitute Ferris' violation of specific portions of Rules 3.4(c); 4.4(a); 5.3(c)(2); and 8.4(a)(c)(d) of the Maine Rules of Professional Conduct. The parties also agree that Ferris acted in violation of Rule 45(b)(1) of the Maine Rules of Civil Procedure. In addition, Bar Counsel contents, but Ferris does not agree, that the facts support a finding of violation of Rule 3.3(a) of the Maine Rules of Professional Conduct. Bar Counsel also contends, but Ferris does not agree, that the facts support a finding of violation of portions of the federal Stored Communications Act, also known as the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701 – 2703.

With violation of some of the Rules of Professional Conduct having been admitted, the principal contested issues for hearing were whether violations of M. R. Professional Conduct 3.3(a) or the Stored Communications Act had been proven and the form and terms of the sanction to be imposed by the Court. Bar Counsel urged the Court to impose a period of actual suspension from practice, while

counsel for Ferris argued for issuance of a public reprimand but no actual suspension from practice.

The grievances resulted from actions Ferris undertook in the course of litigation of (i) a criminal complaint and investigation that did not result in prosecution, (ii) a protection from abuse matter, and (iii) a divorce proceeding in the Waterville District Court. Because Ferris' actions included improper and unnoticed access to and disclosure of privileged information and sensitive personal and health information, this order will reference the persons involved in the litigation, other than the attorneys, by initials not derived from the persons' names.

I. FINDINGS OF FACT

Ferris was admitted to the Maine Bar in October 1992 and has engaged an active general criminal and civil litigation practice in Waterville since that time. Presently, Ferris estimates that approximately one-quarter of his work involves family law matters. Other than a private dismissal with a warning sanction for minor misconduct in 2002, Ferris has no prior sanction record on file with the Board of Overseers of the Bar.

During the course of his litigation practice over the past two decades Ferris has had occasion to utilize M.R. Civ. P. 45 to issue subpoenas "hundreds of times" in civil cases. As an active litigator, Ferris also would have received notice and service of copies of subpoenas served by other parties on numerous occasions.

Among other requirements, Rule 45(b)(1) specifies that copies of discovery subpoenas must be noticed to and served on each other party to the litigation:

> Prior notice of any commanded production of documents and things or inspection of premises or the appearance of a witness in discovery or pretrial proceedings shall be served on each party in the manner prescribed by Rule 5(b) at least 14 days prior to the response date set forth in the subpoena. A party shall have 7 days to object to a discovery or pretrial subpoena and to arrange for the determination of the objection by the court.

Rule 45(c)(3)(A)(iii) further specifies that, presumably after the notice required by Rule 45(b)(1), the court, on a timely motion, "shall quash or modify the subpoena if it … requires disclosure or privileged or other protected matter and no exception or waiver applies … ." These requirements of Rule 45 have been in effect, in substantially their present form, during the time of Ferris law practice.[1]

The legal dispute that led to this disciplinary proceeding arose during a divorce initiated in late 2010 by Attorney Sarah Mitchell's client, Ms. A, against Attorney Ferris' client, Mr. B. Mr. B and Attorney Ferris are cousins. During the divorce Ms. A dated, and after the divorce married, Mr. C, who later became Attorney Julian Sweet's client.

Mr. C is a principal in the business where Ms. A was employed in 2009 and into 2010.

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[1] Rule 45(b)(1) was amended in 1993 to specify that discovery subpoenas for production and inspection of documents must be noticed to other parties "to preserve their opportunity to object to or supplement discovery." Advisory Committee's Notes – 1993. The fourteen-day advance notice requirement was added in 2007.

In 2009, while Ms. A and Mr. B were married, they had a family plan with the cell phone of each on a single account with U. S. Cellular, a cell phone service provider. In the course of her work, Ms. A had to make and receive a lot of business related calls, including many calls to Canada, on her cell phone. This significantly increased the family plan bill. To avoid these costs, Mr. B asked Ms. A to change her cell phone service contract from the family plan to a contract paid for by the business she worked for. This change was made on January 17, 2009. Since that time Ms. A's cell phone has been part of and billed to other accounts described in Exhibit 30. At no time after January 17, 2009, was Ms. A's cell phone service part of or related to Mr. B's cell phone family plan.

In 2010 Ms. A was diagnosed with breast cancer. She was then subjected to a very active and closely monitored treatment program involving doctors and other health care professionals in both Maine and Massachusetts. Some of the monitoring and communication, particularly with doctors in Massachusetts, was accomplished using text messaging to and from Ms. A's cell phone. Occasionally, picture messages of areas of Ms. A's body that had been subject to cancer treatments were sent from Ms. A to treatment providers in Massachusetts. These communications were ongoing during the times at issue in 2010 and 2011.

On December 6, 2010, a divorce complaint, dated November 30, 2010, was filed on behalf of Ms. A against Mr. B. The complaint was filed by an attorney who later withdrew and was replaced by Attorney Mitchell.

On December 8, 2010, Ferris filed an answer and counterclaim for divorce on behalf of Mr. B.

On December 13, 2010 an interaction between Ms. A and Mr. B occurred that resulted in a criminal complaint being filed against Mr. B. The record suggests that the criminal matter was investigated as a terrorizing or a disorderly conduct charge. Ultimately the matter was not prosecuted.

On December 17, 2010, Ms. A obtained a temporary order of protection from abuse that prohibited Mr. B from having any direct or indirect contact with Ms. A except incidental contact regarding school functions of their child.[2] The temporary order was to expire on January 13, 2011. On that date a hearing on the final order was waived and a final order issued, without findings of abuse, prohibiting Mr. B from having any direct or indirect contact with Ms. A except incidental contact regarding their child. The final order was to expire on May 23, 2011. The expiration date was extended first to August 22, 2011, and then, ultimately, to January 2, 2014. Ferris first appeared representing Mr. B in the protection from abuse proceeding on August 22, 2011.

[2] The Court can take judicial notice of docket entries in cases related to the matter that the Court is addressing. *Guardianship of Jewel M.*, 2010 ME 80, ¶ 24, 2 A.3d 301.

On or about January 20, 2011, Attorney Ferris served a subpoena for U.S. Cellular on an attorney at the Augusta office of the PretiFlaherty Law Firm. The January 20 subpoena and each other subpoena at issue in the proceeding was served on the PretiFlaherty attorney because he was listed as the registered agent for U.S. Cellular.

The first subpoena used a Waterville District Court criminal case docket number, but indicated it related to "the matter of" Ms. A v Mr. B, without specifying whether "the matter" was the protection from abuse action or the divorce action. It indicated that it was issued on behalf of Mr. B and commanded U.S. Cellular to produce for inspection and copying at Ferris' law office "Cell phone text messages between [the cell phones of Ms. A and Mr. C] from January 1, 2010 to January 19, 2011."

The subpoena did not indicate the source of Ferris authority to seek the cell phone records. The subpoena was not served on or noticed to Ms. A's attorney. This failure to serve or notify was a violation of M.R. Civ. P. 45(b)(1).

Apparently neither PretiFlaherty nor U.S. Cellular questioned Ferris' authority to get the text message information requested, as a log of the calls between Ms. A and Mr. C and a CD purporting to contain the text messages requested was provided to Ferris sometime after February 1, 2011. The record before the Court contains call logs between August 16, 2010 and December 14,

2010 and a photo copy of a CD and a CD case covered with a handwritten note. The CD is not in the record. What was on the CD, and whether call logs for other dates were provided is not apparent from the record.

The parties' stipulations in this proceeding indicate that at some time the call logs and the CD were turned over or copied to the District Attorney's office. However there is no indication that Ms. A or her attorney were aware that Ferris had sought and U.S. Cellular had provided this information to Ferris until Ms. A's deposition on July 29, 2011.

On April 20, 2011, Mr. B sent a Fax to "US Cell Subpoena Compliance Dept." The Fax stated "Please preserve text message content for [Ms. A's cell phone number] for the time period 04-15-2011 through 4-20-2011 inclusive." The fax also directed U.S. Cellular to call Mr. B's cell phone number if there were any questions. This request to preserve text messages was one of several written and personal contacts that Mr. B had with U.S. Cellular staff to facilitate his access to and review of Ms. A's and later Mr. C's cell phone records and text messages.

On or about May 11, 2011 Ferris served a second subpoena on PretiFlaherty as agent for U. S. Cellular. This subpoena and a subsequent one dated July 15, 2011, referenced no Waterville District Court docket number, and indicated it related to "the matter of" Ms. A v Mr. B, again without specifying whether "the matter" was the protection from abuse action or the divorce action. The May 11

subpoena sought inspection and copying of the "test message" content of Ms. A's cell phone for April 15 through April 20, 2011 "that was preserved by fax dated April 20, 2011."

This subpoena was not limited to text or test messages between Ms. A and Mr. C, but encompassed all of Ms. A's text message communications during that time, including privileged communications between Ms. A and her attorney and privileged communications between Ms. A and her health care providers.

As with the response to the January 20 subpoena, the requested text messages – now all text messages sent to or received by Ms. A in the designated time period – were apparently provided to Ferris and Mr. B by U.S. Cellular without question and without objection.

Again no notice of this subpoena was provided to Ms. A or her attorney. This was a second violation of M.R. Civ. P. 45(b)(1); a breach, by an opposing attorney, of Ms. A's attorney-client privilege, M.R. Evid. 502, to the extent that the text messages included communications with Ms. A's counsel; and a breach of Ms. A's health care professional-patient privilege, M.R. Evid. 503, to the extent that the text messages included communications with Ms. A's cancer care providers.

On or about July 15, 2011 Ferris served a third subpoena on PretiFlaherty as agent for U. S. Cellular. This even broader subpoena sought inspection and copying of: "The test [sic?] message content for the dates, specifically June 16,

2011 through July 14, 2011 for cell number [Ms. A's cell phone] and [Mr. C's cell phone]."

This subpoena also was not limited to text messages between Ms. A and Mr. C, but encompassed all of Ms. A's text message communications during that time, including privileged communications between Ms. A and her attorney and privileged communications between Ms. A and her health care providers. The subpoena also encompassed all of Mr. C's text message communications during the designated time, including all text messages regarding his business, among which were some highly sensitive communications regarding pay and status of some employees of Mr. C's business.

At the time the subpoena sought disclosure of Mr. C's text messages, Mr. C was not a party to or a participant in the litigation.

As with the response to the January 20 and May 11 subpoenas, the requested text messages – now all text messages sent to or received by Ms. A and Mr. C in the designated time period – were apparently provided to Ferris and Mr. B by U.S. Cellular without question and without objection.

As with the first and second subpoenas, no notice of this subpoena was provided to Ms. A, or her attorney, or Mr. C. This was Ferris' third violation of M.R. Civ. P. 45(b)(1); a second breach, by an opposing attorney, of Ms. A's attorney-client privilege, M.R. Evid. 502, to the extent that the text messages

included communications with Ms. A's counsel; and a second breach of Ms. A's health care professional-patient privilege, M.R. Evid. 503, to the extent that the text messages included communications with Ms. A's cancer care providers.

Because Mr. C had no notice of the third subpoena, he had no opportunity to assert that the disclosed text messages may have included privileged material, or material that was entitled to confidentiality as personnel records, trade secrets, or other confidential commercial information. See M.R. Civ. P. 45(c)(3)(B)(i).

On July 29, 2011, Ms. A appeared with her attorney for a scheduled deposition at Ferris' office. Before the start of the deposition, Mitchell stated that she assumed that the deposition would be limited to financial issues, as prior court approval would be required for "non-financial discovery" pursuant to M. R. Civ. P. 112(a). Ferris informed Mitchell that he was unfamiliar with the limitation in the rules that discovery in family law cases, without prior court approval, be limited to financial issues.

In the middle of the deposition, Ferris excused himself briefly. Mitchell assumed Ferris was excusing himself to consult with his client, Mr. B, who was prohibited by the court order in the protection from abuse mattrer from being in the presence of Ms. A. Ferris returned from the break with a thick file full of paper. Acting like he had found a smoking gun in the case, Ferris announced that he had "boxes" containing "thousands" of Ms. A's text messages obtained from U.S.

Cellular, and that he possessed many more than he had brought to the deposition room.

Ferris indicated that he would begin questioning Ms. A about the text messages. Mitchell objected to the lack of notice of these materials and the effort to extend the questioning at the deposition beyond financial issues about which inquiry was allowed with prior court order. After some further questioning apparently related to financial issues, the deposition was completed. Prior to that deposition, Ferris had never informed Attorney Mitchell that he had obtained those communications by utilizing the subpoenas.

Immediately after the deposition, Ms. A terminated her U.S. Cellular service.

About two weeks after the deposition, on or about August 11, 2011 Ferris served a fourth subpoena on PretiFlaherty as agent for U. S. Cellular. This subpoena referenced the divorce action docket number. Like the third subpoena, the fourth subpoena sought inspection and copying of: "The text message content for the dates, specifically July 15, 2011 through 8/10/11 for cell numbers [Ms. A's cell phone] and [Mr. C's cell phone]."

This subpoena also was not limited to text messages between Ms. A and Mr. C, but encompassed all of Ms. A's text message communications during that time, including privileged communications between Ms. A and her attorney and

privileged communications between Ms. A and her health care providers. The fourth subpoena, like the third, also encompassed all of Mr. C's text message communications during the designated time, including all text messages regarding his business, among which were some highly sensitive communications regarding pay and status of some employees of Mr. C's business.

When the subpoena sought disclosure of Mr. C's text messages Mr. C was not a party to or a participant in the litigation. Four days after the subpoena was dated, Ferris noticed Mr. C's deposition and the deposition of Ms. A's mother and another individual for August 26, 2011.

As with the response to the January 20, May 11, and July 15 subpoenas, the requested text messages – now all text messages sent to or received by Ms. A and Mr. C in the designated time period – were apparently provided to Ferris and Mr. B by U.S. Cellular without question and without objection. In the course of obtaining these cell phone messages, Mr. B was advised by U.S. Cellular that he should stop sending preservation letters regarding Ms. A's account because Ms. A had terminated her U.S. Cellular service on July 29, 2011.

As with the three prior subpoenas, no notice of this subpoena was provided to Ms. A or her attorney, despite objection lodged at the July 29 deposition. This was a fourth violation of M.R. Civ. P. 45; a third breach, by an opposing attorney, of Ms. A's attorney-client privilege, M.R. Evid. 502, to the extent that the text

messages included communications with Ms. A's counsel; and a third breach of Ms. A's health care professional-patient privilege, M.R. Evid. 503, to the extent that the text messages included communications with Ms. A's cancer care providers.

Because Mr. C had no notice of the fourth subpoena, he had no opportunity to assert that the disclosed text messages may have included privileged material, or material that was entitled to confidentiality as personnel records, trade secrets, or other confidential commercial information. See M.R. Civ. P. 45(c)(3)(B)(i).

Following the noticing of the depositions, but before the August 26 deposition date, Mitchell filed a motion to quash the deposition subpoenas. There then followed a series of motions and objections to the ongoing discovery and motions for sanctions filed by both parties regarding litigation practices. In opposing two of Mitchell's motions and, separately, in support of his motion for sanctions, Ferris quoted or attached selected text messages between Ms. A. and Mr. C. that he and Mr. B had obtained from U.S. Cellular.

While the discovery motion practice was on-going, on or about September 7, 2011, Ferris served a subpoena on a local credit union seeking inspection and copying of a video of a transaction and account documentation related to a single transaction by Ms. A's mother involving a specifically numbered check. The subpoena included no docket number an indicated it related to an action between

Ms. A and Mr. B that could have been the protection from abuse action or the divorce action. As with the subpoenas to U.S. Cellular, no notice or copy of the subpoena was provided to Ms. A or her attorney or to Ms. A's mother.

The subpoena was received by the credit union's director of security on or about September 14, 2011 following its original receipt by another credit union employee. The director of security called Ferris office and asked to speak with Ferris regarding concerns about the subpoena. Ferris office advised that he was not available, the director of security left his name and number and asked to have Ferris return his call. Ferris never returned the call. However, the director of security was called twice by Mr. B who indicated he was returning the call on behalf of Ferris. The director of security advised Mr. B that he had concerns about the subpoena as drafted and asked Mr. B to have Ferris call him.

Ferris did not make the requested call. Instead, on October 26, 2011 an unsigned facsimile letter by "Charles T. Ferris, Esq./Kathy" was sent from Ferris' office to the branch manager of Ms. A's mother's credit union. That letter falsely stated that the director of security "indicated that he would honor the subpoena" dated September 7, 2011 for the release of Ms. A's mother's records and the video of her transaction regarding the specific check. The director of security had never given any such consent or authorization to Ferris or anyone at his law office.

After learning of the failed effort to subpoena credit union records of a transaction by Ms. A's mother and the false statement sent from Ferris' office to the credit union branch manager, Mitchell filed a second motion for sanctions. The motion requested, among other requested relief, that Ferris be required to obtain court approval before issuing any further subpoenas.

Sometime after learning that Ferris had accessed text messages that Mr. C. had sent and received from his cellphone, Mr. C. retained attorney Julian Sweet to assert his privacy rights, seek return and prevent use of the text messages already obtained by Ferris, and to prevent further access to his cellphone records. In late 2011, Sweet spoke with Ferris regarding the text messages that Ferris and Mr. B had obtained from U.S. Cellular. At the time Ferris stated to Sweet that Ferris had obtained "over 50,000 text messages" from or to Ms. A and Mr. C. Ferris also advised Sweet that he did not plan to distribute the text messages further. In a January 23, 2012 letter to a psychologist consulting on the divorce case, Ferris again referenced the text messages in urging the psychologist to support his client's position in the divorce case.

In early 2012, Sweet appeared in the District Court divorce proceeding, filing a motion on behalf of Mr. C for a protective order and sanctions. Referencing the Stored Communications Act, 18 U.S.C. §§ 2701, 2702, Sweet's motion asserted that it was unlawful for U.S. Cellular to have provided, and Ferris

to have received,[3] Mr. C's text message communications based solely on the civil discovery subpoena served on U.S. Cellular. Sweet's motion also asserted that Ferris had served the subpoenas in violation of the requirement of M.R. Civ. P. 45(b)(1) that all parties to an action be noticed when subpoenas are issued and have a reasonable opportunity to oppose the disclosures sought by the subpoena before the deadline for disclosure of the information. At the hearing before this Court, Ferris stated that his receipt of Sweet's motion was the first time that he became aware that Rule 45(b)(1) required that he notify all parties to an action when issuing subpoenas.

Ferris opposed Sweet's motion, asserting, incorrectly, that Ms. A's cell phone was marital property and part of a multi-line account that included Mr. B's cell phone. If true, this claim could have justified Ferris, on behalf of Mr. B, obtaining text messages generated on Mr. B's U.S. Cellular account. However, as already noted, at Mr. B's direction, Ms. A had separated her cell phone from Mr. B's account in January 2009. Since then, Ms. A had maintained a separate cell phone account. The record does not indicate whether or not Mr. B had informed Ferris that Ms. A's account was not part of his account.

Ferris opposition to Sweet's motion for sanctions also asserted, incorrectly, that his subpoenas had been "narrowly tailored" and "included only the text

[3] Sweet's motion referencing Mr. B acting "by" or "through" his counsel Ferris suggests that as of that time, Sweet may not have been aware that, with Ferris' approval, Mr. B had been communicating directly with staff at U.S. Cellular to review and acquire the text messages.

messages between [Ms. A and Mr. C.] for certain periods of time during the parties divorce." As already noted: three of Ferris' subpoenas sought all text messages to and from Ms. A, including those to or from her attorney and to or from her cancer care providers; two of Ferris' subpoenas sought all text messages to and from Mr. C for the designated time periods.

In a subsequent filing with the District Court opposing the pending motions for sanctions Ferris conceded that the subpoenas were more broadly worded than he had earlier indicated. This filing, exhibit 31 in this record, also contained the frank admission that while Ferris had issued the subpoenas by contacting U.S. Cellular's agent at PretiFlaherty, Ferris' client, Mr. B, had followed up by identifying direct contacts within U.S. Cellular with whom Mr. B had communicated to get access to Ms. A's and Mr. C's text messages. U.S. Cellular would have been aware by the time Mr. B was seeking access to Ms. A's cell phone records and text messages, that Ms. A's cell phone account was not affiliated with Mr. B's cell phone account. PretiFlaherty had no involvement with these direct contacts with U.S. Cellular by Mr. B.

At the time, there was an outstanding protection from abuse order prohibiting Mr. B from having contact with Ms. A. Thus, what U.S. Cellular had done, according to Ferris' statement, was to permit a person barred from contacting Ms. A by a protection from abuse order to work directly with its agents to facilitate

his access to Ms. A's text messages, the text messages of an individual she was dating, and text messages between Ms. A and her attorney and between Ms. A and her cancer care providers. Ferris should not have allowed his client to have such direct contacts with U.S. Cellular to access Ms. A's text messages, and should have stopped such contacts immediately when he learned of them.

Instead of conceding error, in exhibit 31 Ferris justified his and his clients actions as necessary to uncover alleged deception in Ms. A's responses to discovery, arguing, among other things, that: "Any alleged mishandling of the subpoena process was a direct result of a blatant pattern of material misrepresentation, deception, and perjury conducted by the Plaintiff [Ms. A]."

While the motion for sanctions was pending in the District Court, and before the filing of exhibit 31, Sweet and Mitchell filed separate grievance complaints with the Board of Overseers of the Bar addressing the same issues of improper use of a subpoena, without notice, to access the cellphone records and particularly the text messages sent to and from their respective clients. Mitchell indicated that she had elected not to file a grievance complaint earlier to avoid further aggravating and driving up the cost of what already was a difficult divorce that she hoped to resolve with as little additional aggravation as possible.

After a hearing on the motions for sanctions and receipt of written arguments from Mitchell, Sweet, and Ferris, in the pending divorce action the

District Court (*Dow, J.*) issued its Order Finding Violations and Imposing Sanctions on May 11, 2012. The District Court found Ferris to have violated M. R. Civ. P. Rules 45(b)(1) and 112(a) by failing to provide any notice of the subpoenas Ferris had served on U.S. Cellular, and for failing to obtain leave of court, upon a showing of good cause, to conduct that non-financial discovery in that family matter. As a sanction, the court generally prohibited Ferris from using any of the wrongfully obtained text messages in the divorce matter (except for limited impeachment purposes) and further ordered Ferris to personally pay attorney fees of $1,000 to Attorney Mitchell and $500 each to Attorney Sweet and to his co-counsel.

A month later the divorce action between Ms. A and Mr. B was heard and decided on an uncontested basis.

Ferris's actions had significant adverse impacts on Ms. A. Most directly, his actions significantly increased the cost and tension incident to resolution of the divorce. Ultimately, as a result, she agreed to a settlement and resolution of the divorce that, she and her attorney believed, was less favorable than it might have been because she wanted to end the tension, expense, and personal embarrassment that Ferris' actions in accessing her text messages had caused her.

Ms. A. also has been more reluctant to go out and about in the Waterville community because she believes, based on comments that friends and associates

have made to her, that the contents of text messages between her and Mr. C., and between her and her healthcare providers, have been made known to some members of the Waterville community.

Because of the disclosure of the privileged text messages between her and her cancer care providers in Massachusetts, those cancer care providers elected to stop using text messaging for communication with Ms. A. As a result, her communication with the healthcare providers assisting her cancer treatment is less immediate and more difficult.

Ms. A. also remains significantly concerned that more embarrassing contents of text messages may be disclosed. This concern is based on communications to her by Mr. B. indicating that he may have access to file cabinets containing a large volume of her text messages and implying that he may use that access to publish text messages to embarrass her.

For Mr. C., the publication of his text messages has also created embarrassment within the Waterville community. Further, he is concerned that there are text messages that Ferris and Mr. B. have access to that, if disclosed, could adversely affect his relationship with some of his employees, as some of the text messages involved communications with other managers—communications that he anticipated would be confidential—regarding employees' skills and pay levels.

II. CONCLUSIONS

The Stored Communications Act: Section 2701

The Board contends that Ferris violated the federal Stored Communications Act, 18 U.S.C. § 2701(a) by using subpoenas to access Ms. A's and Mr. C's cell phone records and view their text messages. Section 2701(a) provides, in relevant part:

> **(a) Offense.**--Except as provided in subsection (c) of this section whoever--
>
> **(1)** intentionally accesses without authorization a facility through which an electronic communication service is provided; or
>
> **(2)** intentionally exceeds an authorization to access that facility;
>
> and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

These prohibitions appear to address hacking, wiretapping and other means for accessing electronic communication systems that are not known to the electronic communications provider. These prohibitions do not apply to attempts to access electronic communication system information by subpoena. Otherwise the subpoena servers addressed in the many opinions cited below would have subjected themselves the criminal penalties of section 2701(b). The Court finds that Ferris' actions serving subpoenas did not violate section 2701.

The Stored Communications Act: Section 2702

That U.S. Cellular would voluntarily provide to Ferris and Mr. B copies of text messages containing sensitive and privileged material appears extraordinary in light of the on going debate about the propriety of government agencies, supported by court orders, reviewing cell phone call logs that do not even include the actual text of messages such as were freely provided in response to the subpoenas here. Likewise, it appears strange that U.S. Cellular, or any electronic communication provider, would work directly with a person subject to a no contact provision in a protection from abuse order or a person who was subject to a criminal investigation, to facilitate that person's access to the cell phone records and text messages of a court order protected person or a potential criminal case witness.[4]

U.S. Cellular's prompt, unquestioning response to Ferris' subpoenas and its facilitation of direct contacts by Mr. B with U.S. Cellular personnel may have encouraged Ferris to believe, incorrectly, that there was little that was improper about his requests and led him to initiate ever more expansive requests for data.

However, U.S. Cellular's conduct accommodating Ferris and Mr. B in their efforts to access Ms. A's and Mr. C's text messages was a violation of federal law. The Stored Communications Act, 18 U.S.C. § 2702(a)(1) mandates that "a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while

[4] The original purpose given for seeking Ms. A's cell phone records and text messages was to aid Mr. B's defense against possible criminal charges arising out of what appeared to be an incident of domestic abuse or domestic violence.

in electronic storage by that service." *See Mintz v. Mark Bartelstein & Assoc. Inc.*, 885 F.Supp.2d 987, 991, 993-994 (C.D. Cal. 2012) (holding that section 2702(a)(1) prohibits an "electronic communication service" from disclosing text message content in response to a subpoena).

Wireless communications providers such as AT & T in *Mintz* or U.S. Cellular here are properly classified as an "electronic communication service." *Mintz*, 885 F.Supp. at 992; *see also* S.Rep. No. 99–541, at 14 (1986), 1986 U.S.C.C.A.N. 3555, 3568 ("Existing telephone companies and electronic mail companies are providers of electronic communications services.").

Thus, U.S. Cellular must comply with the laws applicable to electronic communication services specified in 18 U.S.C. § 2702(a)(1), unless one of the specifically enumerated exceptions in 18 U.S.C. § 2702(b) apply.

Title 18 U.S.C. § 2702(b) contains many exceptions that do not apply here, such as the exceptions for law enforcement purposes. 18 U.S.C. § 2702(b)(6)-(8). The possibly relevant exceptions include 18 U.S.C. § 2702(b)(1), which permits the disclosure of the contents of a communication "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." Additionally, 18 U.S.C. § 2702(b)(3) permits the disclosure of the contents of a communication "with the lawful consent of the originator or an addressee or intended recipient of such communication." One of these exceptions

might have applied if, as Ferris contended, Ms. A's and Mr. B's cell phone accounts were related numbers on a jointly billed family plan. However, the family plan relationship for these phones and accounts was terminated in 2009.

The Stored Communications Act includes no exception authorizing text message content disclosure based on a civil discovery subpoena. *Mintz*, 885 F.Supp.2d at 991-994; *Bower v. Bower*, 808 F.Supp.2d 348, 349-350 (D. Mass. 2011) (no exception for civil discovery subpoenas, "courts have repeatedly held that providers such as Yahoo! And Google may not produce emails in response to civil discovery subpoenas"); *Crispin v. Christian Audigier, Inc.,* 717 F.Supp.2d 965, 976 (C.D.Cal.2010) (rejecting argument that the SCA permits the disclosure of the contents of communications pursuant to a civil discovery subpoena); *Flagg v. City of Detroit,* 252 F.R.D. 346, 350 (E.D.Mich.2008) ("[A] s noted by the courts and commentators alike, § 2702 lacks any language that explicitly authorizes a service provider to divulge the contents of a communication pursuant to a subpoena or court order."); *Viacom International Inc. v. Youtube Inc.,* 253 F.R.D. 256, 264 (S.D.N.Y.2008) (holding that the SCA "contains no exception for disclosure of such communications pursuant to civil discovery requests"); *In re Subpoena Duces Tecum to AOL, LLC,* 550 F.Supp.2d 606, 611 (E.D.Va.2008) ("Applying the clear and unambiguous language of § 2702 to this case, AOL, a corporation that provides electronic communication services to the public, may not

divulge the contents of [a person's] electronic communications to [an insurance company] because the statutory language of the [SCA] does not include an exception for the disclosure of electronic communications pursuant to civil discovery subpoenas."); *O'Grady v. Superior Court,* 139 Cal.App.4th 1423, 1447, 44 Cal.Rptr.3d 72 (2006) ("Since the [SCA] makes no exception for civil discovery and no repugnancy has been shown between a denial of such discovery and congressional intent or purpose, the Act must be applied, in accordance with its plain terms, to render unenforceable the subpoenas seeking to compel [electronic communication services] to disclose the contents of e-mails stored on their facilities.").

The volume of these citations demonstrates that there is no real doubt about the law. U.S. Cellular violated the Stored Communications Act in allowing Ferris and Mr. B to access Ms. A's and Mr. C's cell phone records and text messages. After adopting clear and specific obligations for privacy protections in section 2702, Congress appears to have deprived citizens of any recourse when cell phone providers violate the law and citizens' privacy by disclosing information that should be protected. Congress has adopted 18 U.S.C. § 2703(e) as follows:

> **(e) No cause of action against a provider disclosing information under this chapter.**--No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a

> court order, warrant, subpoena, statutory authorization, or certification under this chapter.

In effect, cell phone providers are prohibited from giving out protected information in response to a subpoena, but they are protected from any recourse if they violate the law. While Ms. A and Mr. C were wronged by U.S. Cellular enabling Ferris and Mr. B to access many thousands of their text messages in response to Ferris' subpoenas and Mr. B's direct contacts, the Court cannot find that U.S. Cellular's misconduct constitutes an ethical violation by Ferris. As noted above, U.S. Cellular's ready accommodation of his subpoenas led Ferris to believe that his subpoenas were the proper way to access text messages.

However, Ferris delegating to Mr. B responsibility for dealing directly with U.S. Cellular and for accessing, viewing and copying Ms. A's and Mr. C's text messages, as described in Exhibit 31, when Ferris knew that Mr. B was prohibited by court order from contacting Ms. A was a serious ethical violation. In effect Ferris enabled Mr. B, without notice to Ms. A, to contemporaneously monitor Ms. A's text messaging, action which, in a high conflict domestic dispute, could have put Ms. A at risk. This conduct was seriously prejudicial to the administration of justice, violating Maine Rule of Professional Conduct 8.4(d) in a way that did cause serious emotional distress and could have caused physical harm to an opposing party in litigation.

The discipline imposed in this matter must include a plan to identify and remove from Ferris' and Mr. B's access and control the more than 50,000 text messages that Ferris claimed to have obtained from U.S. Cellular.

The Maine Rules of Professional Conduct

The Court will address the other violations of The Rules of Professional Conduct by referencing the Rules that the parties have stipulated were violated in this proceeding:

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Ferris violated Rule 3.4 on five occasions by serving subpoenas without providing the notice required by M.R. Civ. P. 45(b)(1). Additionally Ferris violated Rule 3.4 on three occasions by accessing and allowing Mr. B to access materials that could have included confidential attorney-client communications protected from disclosure by M.R. Evid. 502. These violations, invading an opposing party's privileged communications with counsel, or attempting to do so, are serious violations, requiring a serious sanction. *See Board of Overseers of the Bar v. Ebitz*, BAR-92-10 at 5 (August 18, 1992) (imposing a limited six month

suspension from practice for one instance of reviewing opposing counsel's trial notebook during a trial).

Rule 4.4 Respect for Rights of Third Persons; Inadvertent Disclosures

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Rule 4.4 was violated in four instances by the unnoticed subpoenas that had the effect of depriving Ms. A and Mr. C of their right to learn of and oppose Ferris' and Mr.B's successful efforts to access their text messages. Mr. C, a "third person" was embarrassed by the access to his text messages and the sense that the content of some of those messages may have been disclosed in the Waterville community. He testified it was "painful to have your entire life on display." Other third persons who could have been embarrassed or burdened by these four instances of misconduct include Ms. A's health care providers and Mr. C's employees.

Rule 4.4 was also violated by Ferris' false statement to the credit union indicating that its security director had approved release of information about Ms. A's mother's transaction when no such approval had been given.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(c) a lawyer shall be responsible for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Ferris cannot avoid responsibility for the false statements in the letter to the credit union and the overbroad language and other defects in the subpoenas by blaming his staff. He is responsible for those actions, and his effort to avoid that responsibility by blaming staff or not giving staff proper supervision constitutes a violation of Rule 5.3.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another;

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

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

Rule 8.4 is violated by (i) the unnoticed service of the five subpoenas; (ii) the three instances of access and review or attempted access of attorney-client communications, (iii) the three instances of access and review or attempted access of privileged, confidential and personally embarrassing attorney client

communications; (iv) the false statement to the credit union, and (v) the choice, discussed above in relation to the Stored Communications Act, to enable Mr. B to work directly with U.S. Cellular to access and review a very large volume of Ms. A's and Mr. C's text messages.

Rule 3.3(a) Candor Toward the Tribunal

A lawyer shall not knowingly:

> make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

As noted at the beginning of this opinion, the parties do not agree that Rule 3.3(a) was violated. Bar Counsel contends that Rule 3.3(a) was violated; Ferris' counsel contends that Rule 3.3(a) was not violated. Ferris' advocacy before the District Court was aggressive, sometimes harsh in criticism of Ms. A; his conduct in this matter caused Ms. A emotional distress and could have put her at physical risk; and Ferris on several occasions agued propositions of law that were not sound or supported in statute or precedent. However, unsound legal arguments, by themselves, do not constitute actionable professional misconduct.

One time in the record when Ferris did make an incorrect statement to the District Court regarding the scope of the subpoenas served on U.S. Cellular, he later corrected that statement to concede that the subpoenas had sought all of Ms.

A's and Mr. C's text messages in the relevant time periods, not just those between Ms. A and Mr. C. The Court finds no violation of Rule 3.3(a).

III. SANCTIONS

Based on the Court's findings regarding violation of the Maine Rules of Professional Conduct, the Court proceeds to consider the sanctions that should be imposed. In this case, Ferris, on five separate occasions, served subpoenas—four on U.S. Cellular and one on a local credit union—without providing the required notice to Ms. A's attorney or Ms. A., who are the parties to the action. On three separate occasions, Ferris obtained access to Ms. A.'s text messages, which he knew or should have known could have contained confidential attorney/client communications protected by M.R. Evid. 502, and confidential health care professional/patient communications protected by M.R. Evid. 503. Ferris's access to and disclosure of Ms. A.'s text messages also accomplished a goal for his client by causing Ms. A. to agree to a resolution of the divorce more favorable to Mr. B. then she would have liked because she desired to end the tension, harassment, and embarrassment in the community that Ferris' and Mr. B's access to her text messages had caused.

Ferris's explanations for his actions are difficult. First, he asserts that, until receipt of Sweet's motion for sanctions to the District Court, he was unaware that M.R. Civ. P. 45(b)(1) required parties serving subpoenas in civil actions to notify

all other parties to the action of the service of the subpoena. The Court finds this claim not credible. At the time that the subpoenas were issued, Ferris had been engaged in an active litigation practice for nineteen years. During that time, he had issued subpoenas on hundreds of occasions. Also, in a litigation practice that involved frequent use of subpoenas, Ferris must, on many occasions, have received the required Rule 45(b)(1) notice from other parties in actions in which he was involved when opposing attorneys issued subpoenas.

Ferris also asserts that the overbroad nature of the subpoenas to U.S. Cellular, to the extent that they sought information beyond the text messages between Ms. A. and Mr. C., and the false statement made to the credit union was the fault of his staff in drafting the subpoenas and notices. However, lack of supervision of staff and getting improper documents from staff and then using them is not an excuse, but a confirmation of violation of the rules requiring proper supervision of staff and imposing on attorneys responsibility for errors of professional conduct that are caused by staff involvement in litigation.

Ferris also states that he made his errors as a result of having too close of a relationship with his client and being driven by the desires of his client rather than applying his own professional judgment to his litigation tactics in the divorce. This, likewise, is not an excuse or a mitigating factor regarding Ferris' responsibility for his professional misconduct. With difficult clients, attorneys

have a greater responsibility to assure that they exercise independent judgment and apply appropriate ethical standards in dealing with other parties.

Ferris and Bar Counsel agree and the Court finds that Ferris violated obligations under the Rules 3.4(c); 4.4(a); 5.3(c)(2); and 8.4(a)(c)(d) of the Maine Rules of Professional Conduct. As discussed above, the violations of the Rules are many and significant, particularly with regard to their impact on opposing parties and third parties in litigation. Balanced against this is Ferris twenty years of active litigation practice, with no prior ethical violations of note, as he provided, and can continue to provide, important service to many people who need legal assistance, including some who have limited ability to pay. Despite the importance and value of Mr. Ferris' service to his community, the Court concludes that the number and seriousness of the ethical violation committed would be diminished if no period of suspension were imposed. Accordingly, the Court will impose sanctions as follows.

The Court ORDERS:

1. Charles T. Ferris is suspended from the practice of law for a period of six (6) months, beginning on March 3, 2014 and ending on September 3, 2014.
2. On or before March 3, 2014 Charles T. Ferris shall comply with the notice requirements stated in M. Bar R. 7.3(i)(1).

3. Charles T. Ferris shall assemble and turnover to Bar Counsel all copies of text messages of Ms. A and Mr. C possessed in his office in either paper or electronic form and shall cooperate with Bar Counsel in an audit of his office files, computers and smart phones to identify and turnover to Bar Counsel all copies of such text messages. Ferris shall also retrieve all copies of such messages possessed by his client or former client Mr. B, and turnover such messages to Bar Counsel. Ferris shall pay the costs of an audit to assure that all text messages improperly provided by U.S. Cellular are recovered and turned over to Bar Counsel and that all paper and electronic copies of the text messages are purged from any and all files or electronic equipment accessible to or under the control of Mr. Ferris, his firm, or Mr. B.. When the audit, purging of files and equipment, and identification and turnover of all text messages improperly provided to Ferris or Mr. B by U.S. Cellular is completed, Bar Counsel shall so certify to the Board of Overseers of the Bar. Ferris may be reinstated to active practice of law only after completion of the six month suspension and after Bar Counsel provides the certification to the Board.
4. Bar Counsel is requested to notify the Attorney General of the State of Maine and the United States Attorney about the practices of U.S. Cellular regarding permitting access to cell phone records and text messages that

have been at issue in this case. While federal law would not appear to permit much recourse against U.S. Cellular for violations of laws intended to protect cell phone users privacy, it may be important to know that U.S. Cellular access practices apparently permit individuals who are subject to protection from abuse orders, domestic violence complaints, and criminal investigations to utilize subpoenas to access the cell phone records and text messages of persons protected by protection from abuse orders and persons who may be crime victims or witnesses. Consideration may need to be given to means for protection of the privacy and security of such persons who may be U.S. Cellular subscribers.

Date: January 31, 2014

_____/S/_____
Donald G. Alexander
Associate Justice
Maine Supreme Judicial Court