

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. BAR-15-13

BOARD OF OVERSEERS OF THE BAR)

Plaintiff)

v.)

DONALD F. BROWN)
of Brewer, ME)
Me. Bar #008541)

Defendant)

ORDER (Corrected 6/22/16)

Donald F. Brown, Esq. has filed a petition for review by a Single Justice of the Maine Supreme Judicial Court, following a Report of Findings and Sanctions of a Grievance Commission of the Board of Overseers of the Bar. *See* M. Bar Rule 13(f).¹ Pursuant to the Scheduling Order dated November 23, 2015, the parties submitted written argument and waived oral argument.

¹ Although the current version of the Maine Bar Rules became effective while this proceeding was pending before the Grievance Commission, the proceeding is governed by those Rules. *See* M. Bar Rule 33.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts found by the Grievance Panel are supported by the record, *see* M. Bar Rule 13(f)(4) (requiring a Single Justice to accept a Grievance Panel's findings of fact unless clearly erroneous), and, in any event, are undisputed.

This attorney discipline action arises from Attorney Brown's representation of former Washington County Sheriff Donald Smith. In December 2012, while still Sheriff, Smith suspended Karina Richardson from her employment with the County and requested the County Commissioners to terminate that employment. After a hearing held before the Commissioners, they did so. Richardson challenged the termination decision through a grievance process that consisted of arbitration. When the matter was arbitrated, the County was represented by the law firm of Rudman Winchell; Smith was represented by Attorney Brown; and Richardson was represented by Jeffrey Davidson, Esq. The arbitrator ultimately reinstated Richardson's employment subject to a six-month suspension.

In addition to invoking the grievance process, Richardson applied for unemployment insurance benefits. That application led to a contested administrative hearing held by a hearing officer, where Rudman Winchell again represented the County, and Attorney Davidson represented Richardson. Smith was not a party to the unemployment insurance proceeding before the hearing officer, and Attorney Brown was not involved in it. After the hearing, the hearing officer determined that

Richardson was eligible for unemployment benefits because her termination was not precipitated by employee misconduct.

Although the County did not appeal from the hearing officer's decision, Smith did file an appeal to the Maine Unemployment Insurance Commission. *See* 26 M.R.S. § 1082(14). The record does not indicate that Attorney Brown sent Attorney Davidson a copy of the appeal to the Unemployment Insurance Commission. The Commission affirmed the award of benefits, and Smith filed an appeal with the Superior Court (Washington County). *See* M.R. Civ. P. 80C.² When Attorney Brown commenced that action, he served the Commission and the Attorney General with the Rule 80C complaint as required by 5 M.R.S. § 11003(1)(A), (C). He did not serve Attorney Davidson or Richardson, however, even though he was required to do so pursuant to 5 M.R.S. § 11003(1)(B) because Richardson was a party to the action. Then, over the next several months, Attorney Brown filed with the court a number of motions for enlargement of time and, eventually, Smith's brief on appeal. Attorney Brown did not send copies of these filings to Attorney Davidson or to Richardson except for Smith's reply brief, which he sent to Attorney Davidson

² The record leaves open the question of whether the County Commissioners authorized Smith to pursue the matter in those ways. Attorney Brown provided testimony that, at best, was equivocal about whether the County Commissioners authorized the initial appeal to the Unemployment Insurance Commission. He testified, for example, that he did not consult with the County Commissioners until after he filed Smith's appeal to the Commission, and the complaint in the Rule 80C appeal identifies Smith as the plaintiff even though, as the Grievance Panel found, Smith does not have "independent authority to speak for the County in such proceedings." The question of authorization is not material to this disciplinary proceeding.

when he filed it with the court, and the principal brief, which he sent to Attorney Davidson belatedly with the reply brief.

Shortly after Attorney Brown commenced the court action, an assistant attorney general entered an appearance for the Unemployment Insurance Commission and filed the administrative record, sending copies to Attorneys Brown and Davidson, with statements in the filings that both attorneys were copied. The caption in the Commission's court filings listed Richardson as a defendant. In mid-April 2014, another AAG entered an appearance and filed a motion, also sending copies to Attorney Davidson. The following month, after receiving that material, Attorney Davidson made a written inquiry with the clerk's office about the case, because neither he nor Richardson had received a copy of the Rule 80C complaint that Attorney Brown had filed and he had understood that the County was not going to appeal the unemployment insurance decision that was favorable to Richardson. Attorney Davidson's filings indicate that he sent a copy of that inquiry to Attorney Brown.

Later in May, the AAG representing the Commission filed the agency's brief. In early June, Attorney Brown filed Smith's reply brief and sent a copy of both the principal and reply briefs to Attorney Davidson. This was the first time Attorney Brown had provided Attorney Davidson with a copy of a court filing, but he still did not send Attorney Davidson the Rule 80C complaint itself. Attorney Davidson filed

a motion to dismiss the complaint and for an award of sanctions, based on assertions that Smith had not served Richardson with the complaint and that Smith was not authorized to proceed with the appeal. Counsel for the Unemployment Insurance Commission also moved to dismiss the case based on her understanding that the County Commissioners had instructed Smith to dismiss the appeal. In fact, the present record contains a letter from the Commissioners to Attorney Brown, written during that time period, authorizing payment to Attorney Brown for his legal work but instructing him not to pursue the appeal any further.

Attorney Brown discussed the situation with Smith, who told Attorney Brown to continue with the appeal.

The court (*Billings, J.*) held a conference of counsel on July 30. Attorney Brown participated telephonically and stated that he did not oppose the motions to dismiss Smith's appeal, although he did not initiate a dismissal. The court granted the motions to dismiss, stating on the record that it was "troubled" that Attorney Brown failed to serve Richardson with the Rule 80C complaint or provide copies of court filings to her or to Attorney Davidson, when Attorney Brown either knew of those requirements or "easily" could have learned about them by researching the issue. The court also found, however, that Attorney Brown's "procedural failures" did not cause actual prejudice to Richardson. The court declined to reach Richardson's motion for sanctions because the record on that issue was insufficient,

and so the court ordered that the issue of sanctions be rescheduled. The present record does not reveal whether and, if so, how the issue of sanctions was adjudicated or otherwise resolved.³

In May 2015, the Board of Overseers of the Bar filed a disciplinary petition against Attorney Brown, alleging violations of Maine Rule of Professional Conduct 1.1, which requires an attorney to proceed competently; M.R. Prof. Conduct 3.4, which addresses the duty of candor owed to an opposing party and counsel; and M.R. Prof. Conduct 8.4, which defines categories of professional misconduct. A contested hearing was held in August 2014 before Grievance Panel B. There, Attorney Brown admitted that he did not represent Smith competently but argued that the violation warranted only an admonition.

In September 2015, the Panel issued a written decision finding that Attorney Smith's failure to serve Richardson with the Rule 80C complaint, although not intentional, constituted a lack of competence that "was a significant breach of his professional responsibility." The Panel found that Attorney Brown had sufficient opportunity to discover that he had failed to serve Richardson and yet, even after he was placed on actual notice of that problem when Attorney Davidson wrote to the court about it, never took any formal steps to cure the deficiency. The Panel also

³ In his brief in this case, Attorney Brown states that Richardson did not follow up on her motion for sanctions.

found that Attorney Brown's incompetency affected Richardson, Washington County, the Attorney General's office, and the court, because as a result of Attorney Brown's failing, they were required to spend "time and money on a case that was litigated but could not be resolved on the merits. . . ." The Panel concluded that because Attorney Brown's misconduct was not minor, and because it caused more than little injury, the proper sanction was a reprimand rather than the lesser response of an admonition. *See* M.R. Prof. Conduct 13(e)(10)(C).

Attorney Brown filed the pending Rule 13(f) petition for review of the Panel's decision by a Single Justice. By order of the Chief Justice, the matter was assigned to me. In this review proceeding, Attorney Brown does not contest the Panel's determination that he violated the Rules of Professional Conduct. Rather, his challenge is limited to the nature of the sanction that the Panel imposed: he argues that the proper sanction is an admonition rather than a reprimand. *See* M.R. Prof. Conduct 13(e)(10)(B).

II. DISCUSSION

In an appeal from a grievance panel's imposition of a reprimand, a Single Justice's review is limited to the record developed before the panel. Findings of fact may be set aside only if they are clearly erroneous. *See* M. Bar Rule 13(f)(4). A Single Justice may affirm, vacate, or modify the panel's decision. *Id.* As is suggested by the deferential standard of review given to a panel's factual findings,

proceedings under Rule 13(f) are viewed as appellate in nature. *See* June 2015 Reporter’s Notes to Rule 13(f).⁴

The dispositional alternatives available to a Grievance Panel on a finding of attorney misconduct are set out in Maine Bar Rule 13(e)(10). A panel is required to impose an admonition—which Attorney Brown asserts is the appropriate sanction—if the panel finds “that the misconduct is minor; that there is little or no injury to a client, the public, the legal system, or the profession; and that there is little likelihood of repetition by the attorney. . . .” Maine Bar Rule 13(e)(10)(B). Pursuant to Rule 13(e)(10)(C), a panel is authorized, but is not required, to impose a reprimand—which is the sanction the Panel imposed here—if at least one of the predicate circumstances requiring an admonition is not present.

I conclude that the Panel did not err by concluding that Attorney Brown’s misconduct was more than minor and that it caused something more than “little or no injury.”⁵

First, the Panel did not err by concluding that Attorney’s Brown’s failure to integrate Richardson into the Rule 80C action was more significant than a minor breach of ethical standards. As the Superior Court observed when it addressed the

⁴ This is in contrast to attorney discipline proceedings commenced under Rule 13(g) when Bar Counsel files with the Court an information seeking suspension or disbarment. Judicial proceedings based on such an information are *de novo*.

⁵ Even if I were to consider these issues *de novo*, I would reach the same conclusions.

motions to dismiss, the statute governing those procedures clearly required Attorney Brown to serve Richardson with the complaint. In fact, in section 11003, which governs service to commence a Rule 80C appeal, that requirement is textually surrounded by the service requirements applicable to the agency and the Attorney General, which Attorney Brown *did* satisfy, and Attorney Brown testified that he read section 11003. Further, the need to serve Richardson with the complaint should have been obvious from Richardson's participation in the agency proceeding, where she contested Smith's challenge to her application for unemployment insurance benefits.

Attorney Brown's initial but ongoing failure to serve Richardson with the complaint then was aggravated by his failure to send copies of court filings to her attorney while the case progressed, even when there were signals from others, namely, the assistant attorneys general who were involved in the case, putting him on notice he should be doing so. It was not until the last of Attorney Brown's filings, namely, Smith's reply brief, that he sent something to Attorney Davidson—and even then, Attorney Brown did not provide Attorney Davidson with copies of previously filed submissions other than Smith's initial brief. Finally, in the face of a motion to dismiss based on the failure to serve Richardson, Attorney Brown—who had been instructed by his client to continue with the appeal—merely acquiesced to an order granting that motion.

In addition to falling materially short of basic procedural requirements, Attorney Brown's omission had the effect of excluding from the Rule 80C proceeding the party whose interest was perhaps most at stake. Until late in the process—and in fact not until after the time when she would have filed her argument on appeal, Richardson was not on notice of Smith's judicial action, which Attorney Brown executed, seeking to deny her the unemployment insurance benefits she had been awarded. Regardless of the merits of the various arguments on Richardson's application, even though it did not rise to the level of an intentional effort by Attorney Brown to bypass Richardson, the magnitude of this misconduct was not minor.

Second, even though Attorney Brown eventually acceded to the efforts of the Commission and Richardson to terminate the appeal, the case caused damage in the form of an unnecessary loss of time and waste of effort. Richardson's exclusion from the judicial proceedings fatally tainted any result because, as the Panel correctly observed, even though the case ran much of its course, Attorney Brown's misconduct made it impossible for the court to render a decision that would have any effect. Nonetheless, judicial staff and at least one judge had to process the case. Additionally, the Attorney General's office was required to prepare and file the record on appeal, and Commission's counsel wrote and filed a brief. By arguing that none of this amounted to harm, Attorney Brown reveals an apparent lack of

