

STATE OF MAINE

SUPREME JUDICIAL COURT  
DOCKET NO: BAR-17-18

BOARD OF OVERSEERS  
OF THE BAR,

Plaintiff

v.

ORDER ON  
PETITION FOR REVIEW

ANTHONY P. SHUSTA II,

Defendant

This matter is before the Court on Anthony P. Shusta II's petition for review, pursuant to M. Bar. R. 13(f)(1), from a Report of Findings and Order of Panel E of the Grievance Commission, GCF No.15-291, dated September 8, 2017. That decision, entered after a contested hearing, found violations of Maine Rules of Professional Conduct Rules 3.3(a)(1) (Candor Toward the Tribunal); 4.3 (Dealing with Unrepresented Person); and 8.4(a) and (c) (Misconduct). As a sanction, the Grievance Commission ordered a public reprimand and a two-year period of supervised probation subject to several conditions. Shusta filed a timely petition for review by a single justice from that decision. M. Bar R. 13(f)(1).

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**BOARD OF OVERSEERS OF THE BAR**

The appeal was heard on May 23, 2018, at the Capital Judicial Center in Augusta. The Board of Overseers of the Bar was represented by Assistant Bar Counsel Alan P. Kelley. Anthony P. Shusta II appeared on his own behalf.

Prior to commencement of the hearing, two matters effecting the scope of the issues on appeal were addressed:

1. Without objection from either party, and as addressed in the Court's Scheduling Order of April 9, 2018, the Court added to the record for consideration on appeal a copy of an unsigned agreement entered between Shusta and Bar Counsel recommending disposition of the disciplinary proceeding by stipulated facts and an admonition.

Also added to the record on appeal was an affidavit by the Executive Director of the Board of Overseers of the Bar dated April 12, 2018. That affidavit stated the substance of unrecorded discussions between the Executive Director and Grievance Commission Panel E that occurred on June 14, 2017, near the conclusion at the first day of the hearing. Neither Shusta nor Assistant Bar Counsel were in the hearing room when that discussion had occurred. On May 23, Shusta indicated that, although the issue was reserved for decision in the Scheduling Order, he no longer wished to examine the Executive Director of the Board of Overseers of the Bar regarding her conversations with the Grievance Commission on June 14.

2. Some statements in various documents filed on Shusta's behalf during the pendency of this petition for review indicated that, in addition to his direct appeal of the decision in GCF No. 15-291, Shusta may also have been attempting to challenge, in this proceeding, the results of a separate decision by Panel A of the Grievance Commission, GCF No. 15-063. That decision had been rendered in 2016. Shusta indicated that he was not pressing any challenge to the result in GCF No. 15-063.

With these issues resolved, no further taking of evidence was required and the parties proceeded to argument.

#### STANDARD OF REVIEW

The standard of review for these matters is specified in M. Bar. R. 13(f)(4). Review is based on the record developed before the Grievance Commission plus any additions to that record ordered by the Court. The standard of review as to the facts is deferential. Findings "shall not be set aside unless clearly erroneous." *Id.* Thus, findings must be affirmed if supported by any evidence in the record and reasonable inferences that may be drawn from that evidence. *See Board of Overseers of the Bar v. Warren*, 2011 ME 124, ¶ 25, 34 A.3d 1103 (addressing the standard of review of fact-findings and conclusions by a single justice). The Court reviews Grievance Commission conclusions based on the findings and any rulings as to law de novo. *Id.*

## DISCUSSION OF ISSUES

The following statements of the facts are drawn from the findings of the Grievance Commission dated September 8, 2017, and evidence in the record of the Grievance Commission proceeding, including a transcript of a March 9, 2015, District Court hearing.

The violations of the Maine Rules of Professional Conduct that are alleged arose out of events that occurred before and during a hearing that occurred before a magistrate at the Skowhegan District Court on March 9, 2015. That proceeding related to a petition for determination of paternity and assessment of child support obligations filed against Shusta's client by the Maine Department of Health and Human Services, FM-2014-00126, and a separate petition for determination of parental rights and responsibilities filed by Shusta on behalf of his client, the father of the child, against the mother of the child, FM-2015-0003.

At all times relevant to the ethics complaint, the mother was not represented. The mother was appointed counsel after she filed a petition for termination of the father's parental rights following the District Court hearing

At some time prior to the District Court hearing date, Shusta, acting on behalf of the father, contacted the mother to explore the possibility of negotiating an agreement in the parental rights matter. The outlines of the

proposed agreement were that (i) the mother would have sole parental rights and responsibilities for the child, (ii) the father would have no contact with or responsibility for the child, (iii) the father would pay retroactive child support for the child in an amount determined in the proceeding initiated by the Department of Health and Human Services until the parental rights and responsibilities order and a concurrent order terminating the father's parental rights were entered, and (iv) the mother would initiate a termination of parental rights proceeding that would be agreed to by the father. The object of the termination of parental rights and responsibilities proceeding would be to end any of the father's obligations toward or responsibilities for the child.

The District Court had schedule a mediation session with a mediator and then a status conference with the magistrate for March 9, 2015. Because the parental rights and the paternity and child support proceedings had been combined, the father, the mother and the Department were notified of the mediation session and the status conference.

Shusta, the father, and the mother appeared and participated in the mediation session. No representative of the Department appeared to participate in the mediation session. Discussion of the prospective settlement agreement between the father and the mother continued during the mediation session in the presence of the mediator, an experienced attorney. The mediator

reported to the magistrate apparent resolution of at least the parental rights matter, based on the discussion at the mediation session.

The court then held its status conference on the record. At the status conference, Shusta, the father, the mother and a support enforcement agent for the Department appeared. No attorney appeared to represent the Department. The Department being represented by a support enforcement agent appears to have been an accepted practice in such proceedings.

Shusta stated the elements of his discussions with the mother and the prospective settlement to the magistrate. The Department agent then suggested that the terms of the settlement agreement, particularly related to termination of child support, should be subject to review and discussion by the Assistant Attorney General representing the Department. Shusta responded in a manner indicating that "she" had had an opportunity to review the settlement agreement and the petition for termination of parental rights. Shusta had not discussed the matter with any assistant attorney general. The actual colloquy at issue is found on page four of the transcript of the March 9 hearing.

Based on the representation of the parties and the court's inquiries of the mother and the father as to whether they understood the terms and implications of the settlement agreement, including an inquiry to the mother in which she indicated that adoption of the child was under consideration, the

court approved the settlement agreement and, prospectively, the agreed to the termination of parental rights petition.

Counsel was appointed to represent the mother in the termination of parental rights proceeding. Subsequently, on the Department's request to the District Court for reconsideration, the termination of parental rights determination and the waiver of the father's obligation to pay future child support were vacated and, it appears, the father continues obligated to pay child support. It is prior to this point that all of the ethical violations are alleged to have occurred.

This disciplinary proceeding was initiated by a September 2015 complaint filed with the Board by an Assistant Attorney General representing the Department.

#### MISREPRESENTATION TO MAGISTRATE

The evidence before the Grievance Commission regarding violation of Maine Rules of Professional Conduct Rule 3.3(a)(1) (Candor Toward the Tribunal) is in conflict. The Department contended that Shusta had misrepresented to the magistrate that he had reviewed the settlement agreement with an Assistant Attorney General representing the Department. Shusta contended that he heard the Department's agent's question about review of the settlement agreement as referencing the mother, not an Assistant

Attorney General. However, on a deferential view of its fact findings, there is more than sufficient evidence in the record to support the Grievance Commission's finding that Shusta misrepresented to the court that he had reviewed the termination petition and settlement agreement with an Assistant Attorney General and that the Assistant Attorney General, "she," had then made changes to render the agreement more to her approval.

On this record, the Grievance Commission committed no error of law in determining that Shusta had violated Rule 3.3(a)(1). A finding of a violation of Rule 3.3(a)(1) also supports a finding of a violation of the catch-all provision, Rule 8.4 of the Maine Rules of Professional Conduct.

#### COMMUNICATION WITH UNREPRESENTED PARTY

The Court turns to the issue of the Grievance Commission finding of a violation of Rule 4.3 (Dealing with Unrepresented Person). The Grievance Commission findings indicate that Shusta met with the mother to discuss a settlement that would include termination of the father's parental rights and that the mother indicated agreement with Shusta's suggested settlement. A key meeting occurred on March 9, 2015, at the courthouse, prior to the mediation session. At that March 9 meeting, the Grievance Commission found, Shusta presented and the mother signed the petition to terminate the father's parental rights. This settlement was discussed with the mediator, then the parties went



before the magistrate to discuss the settlement, including the proposed termination of parental rights.

Throughout these discussions, the Grievance Commission found that in the mother's interactions with Shusta, she "did understand that he was not representing her legal interests."

Before the magistrate, Shusta acknowledged that a petition for termination of parental rights would be filed "tomorrow," that the mother had requested some changes in the petition that had been made, and that the father would consent to termination of parental rights. The court then questioned the father and the mother regarding their understanding of the agreement in the parental rights matter, including a question to the mother to which the mother responded indicating that an adoption of the child was possible.

During questioning by the court, under oath, the mother acknowledged to the court that (i) she was getting sole decision-making authority; (ii) the child would live with her; (iii) the father would have no contact with the child; (iv) she was not requesting future child support; (v) she had a right to a hearing on all of the issues to which she was agreeing; and (vi) she was agreeing to the final parental rights resolution "of your own free will." The court then indicated that it approved the parental rights agreement, including termination of the father's child support obligation, effective March 13, 2015.

The termination of parental rights petition was filed by the mother the next day.

Rule 4.3 addressing dealings between counsel for a party and an opposing unrepresented party in a proceeding states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, but may provide legal information to and may negotiate with the unrepresented person. The lawyer may recommend that such unrepresented client secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

On the available record, the Grievance Commission found that the mother understood that Shusta was not representing her legal interests, and there is nothing in the record of events occurring in 2015 that otherwise indicates that the mother misunderstood the lawyer's role. The court's independent inquiry of the mother confirms that she understood the basics of the settlement agreement and was making that agreement of her own free will. Accordingly, the record of the events in 2015 does not support the Grievance Commission's conclusion that Shusta had improperly provided prohibited legal advice to an unrepresented individual. Shusta provided legal information to the mother and

negotiated with her as authorized by Rule 4.3, but the trial court's independent inquiry demonstrates that Shusta's communications with the mother did not constitute legal advice that induced the mother to do something that was contrary to her own interest.

This view is confirmed by review of Rule 4.3 Comments [2] and [2A], which provide aids to interpretation of Rule 4.3. Those Comments state:

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person, or recommending an unrepresented person secure counsel. *So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.*

[2A] *This rule is not intended to limit negotiations between a lawyer and an unrepresented person, nor limit information provided by the lawyer to an unrepresented person.*

The portions of the comments that are italicized, added to the Grievance Commission's finding that the mother understood that Shusta was not

representing her legal interests, appear to summarize the interactions between Shusta and the mother in this case: proper negotiation, information about the terms on which the matter might be settled, preparation of a document to implement the settlement that was explained to the mother and that required her signature after changes were made that she requested. These actions, taken in 2015, reviewed at the time by the trial court, do not demonstrate violation of the terms of Rule 4.3 and Comments [2] and [2A].

In domestic relations matters, many parties are unrepresented. And in many cases, as in this case, one party is represented and the other party may not be represented. In such circumstances, experience indicates that the attorney for the represented party often speaks with the unrepresented party about the substance of the case with an eye towards resolution of the matter without a full trial. There is no ethical violation in such contact. Such contact is encouraged by court processes in domestic relations matters with the hope of avoiding trauma to children by promoting resolution of cases by agreement without contested hearings. When, as here, agreements are reached in preliminary proceedings, magistrates are authorized to “enter agreements on the record at the conference.” M.R. Civ. P. 110A(b)(1).

Such discussions and negotiations occur in all types of cases, including cases where determination of child support may be an issue. Sometimes, there

may even be a partial unity of interest between the represented party and the unrepresented party. The unrepresented party may be desirous of having sole parental rights to the child, with the represented party having no participation in the unrepresented party's life or the child's life. Or, as here, the unrepresented party with the child may have no personal interest in collecting child support benefits from the represented party because the child support benefits would actually be paid to the Department. In such circumstances, it is neither unusual nor unethical for the attorney of the represented party to draft documents for the parties to sign to memorialize and implement agreements the parties have reached with regard to parental rights and responsibilities and child support.

In the child support collection case, the Department certainly had an interest adverse to both the mother and the father, because it wanted to continue to collect child support payments from the father to offset the payments that the State was making to the mother to support the child. However, this adverse interest does not create the type of conflict of interest between the represented father and the unrepresented mother that would make the father's attorney's dealings with the mother an ethical violation. In this proceeding, Shusta has been sanctioned based on the Grievance Commission's finding that he had misrepresented to the court the Department's

position regarding the proposed settlement of the case. However, Shusta's dealings with the Department do not implicate Rule 4.3.

Thus, in the circumstances, the father's attorney's communications with the mother, his development of documents to implement their settlement agreement, and his drafting of a private termination of parental rights petition for the mother to file with the father's agreement, did not constitute a violation of Rule 4.3 or any other rule of ethics.

Any opinion suggesting that contact and drafting agreements between an attorney representing a party in a domestic relations matter and an unrepresented party in the same matter is an ethical violation could seriously complicate the processing of domestic relations cases. Such contacts must occur with the hope that, as occurred here, a domestic relations case can be resolved by agreements negotiated between the parties without the delay, cost and trauma to the child that result from fully contested proceedings. It must be noted also, that, beyond the contacts between the father's attorney and the mother, extra protection was provided by the fact that the trial court made an independent inquiry of the mother and the father about their understanding of the settlement agreement, and its implications and only indicated the court's approval of the represented terms of the settlement agreement after the court made its own inquiry of the parties.

The Court concludes as a matter of law that the Grievance Commission erred in determining that the contact between the father's attorney and the mother, including the drafting of documents, where the court then made inquiry of both parties regarding their understanding of the settlement agreement, amounted to an ethical violation. Accordingly, the Grievance Commission's conclusion that Rule 4.3 was violated is vacated.

#### CONCLUSION AND SANCTIONS

Near the completion of the oral argument, the Court inquired of the parties what steps should be taken if the Court determined as a matter of law that the Grievance Commission had erred in determining that Rule 4.3 had been violated but affirmed the Grievance Commission's finding of a violation of Rule 3.3(a)(1) and, consequently, the finding of a violation of Rule 8.4. Both parties indicated, in response to the Court's inquiry, that the Court itself should then proceed to decide the appropriate sanction. Remand to the Grievance Commission was not suggested.

Considering what is left, the determination that Rule 3.3(a)(1) (Candor Toward the Tribunal) had been violated, the Court determines that appropriate sanction, in the circumstances, is a public reprimand. The Court determines that a period of probation, as ordered by the Grievance Commission after finding violations of both Rule 3.3 and Rule 4.3, is not merited. Testimony from

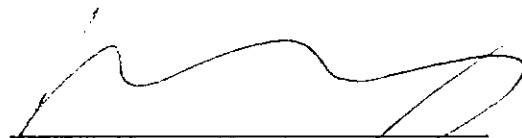
the magistrate at the Grievance Commission hearing indicated considerable experience with Attorney Shusta and no indication of any significant problem with misrepresentation of matters to tribunals. Accordingly, a term of probation could add considerable cost and difficulty to an attorney's practice and is not warranted when there is no demonstrated problem that would be significantly resolved with a period of probation.

Based on the above discussion, the Court vacates the determination of a violation of Rule 4.3, and the Court vacates the ordered sanction that was based, in part, on the determination of violation of Rule 4.3.

On its reconsideration of the sanction, in accordance with the suggestions of the parties that it decide the sanction upon finding that the Rule 4.3 violation has not been demonstrated, the Court determines an appropriate sanction is a public reprimand, and the Court orders a public reprimand. No other sanction is imposed.

SO ORDERED.

Dated: May 31, 2018



Donald G. Alexander  
Associate Justice

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