STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. BAR-08-04

BOARD OF OVERSEERS OF THE BAR,

Plaintiff,

v.

ORDER

SETH T. CAREY,
Rumford, Maine
Me. Bar #9970,

Defendant.

This matter was initially presented to the Court upon a Petition for Temporary Suspension and Expedited Hearing dated May 21, 2008, submitted pursuant to Maine Bar Rule 7.3(c). The petition was merged and consolidated by agreement of the parties[1] with an Information dated September 10, 2008. An evidentiary hearing was held on October 7 and 8, 2008. The Plaintiff was represented by Assistant Bar Counsel Aria eee and the Defendant (hereinafter "Mr. Carey") was represented by Stephean C. Chute, Esq. At the close of the evidence, the parties were invited to submit memoranda addressing Mr. Carey's motions to strike and motions in limine. After this Court entered its order of November 25, 2008, the parties were invited to submit written closing arguments. Oral argument was held on February 6, 2009.

FINDINGS OF FACT

The Plaintiff offered evidence of a number of circumstances which it suggests constitute violations of specific bar rules. In some instances, the parties agree upon the facts. The testimony of the witnesses, however, included some significantly irreconcilable accounts of the events at issue. The Court addresses the events separately and finds as follows.

The Burgess Divorce

Mr. Carey represented Brandon Burgess in a divorce action against Tara Roy. The evidence suggests that the parties had a protection from abuse order pending at the time of the divorce. An interim order required Brandon to pay child support to Tara and to deliver a Jeep to her for use during the divorce proceedings. When the Jeep was not delivered to Tara in a timely fashion, Tara's attorney, David Austin, Esq., wrote to Mr. Carey demanding its delivery. When he received no response, Austin commenced an action against Brandon for contempt.

[1] Although Mr. Carey agrees with the procedural aspects of this consolidation, he has consistently objected to the submission of any factual allegations that were not expressly presented to the Grievance Commission as part of the earlier proceedings. *See* this Court's order dated November 25, 2008.

In the meantime, Brandon approached Mr. Carey and suggested that an agreement had been worked out between Tara and himself to resolve all issues (including the pending contempt action). Brandon asked Mr. Carey to reduce the agreement to writing in appropriate legal terms and he (Brandon) would present it to Tara.

Mr. Carey produced the document for the parties' signatures. Brandon presented it to Tara for her consideration. While Brandon was urging Tara to sign the document, he was speaking with Mr. Carey by using the speakerphone function of his cellular telephone. Tara was able to hear Mr. Carey. Because Tara felt that Brandon and Mr. Carey were pressuring her to sign the document, she refused to do so and later telephoned her attorney to report the incident.[2]

Attorney Austin confronted Mr. Carey shortly thereafter with a sharp admonition that he must not "go behind [his] back" to get his client's signature on the document. Mr. Carey did not acknowledge any wrongdoing to Attorney Austin.[3] Shortly thereafter, Attorney Austin learned that there were two settlement documents (Board Exhibits 6 and 7) in his client's possession, one of which was apparently prepared by Mr. Carey after Austin's admonition.[4]

The issue of the settlement proposal documents was addressed briefly during the divorce trial. District Court Judge McElwee confirmed that Austin was surprised by the existence of the settlement documents. Despite Mr. Carey's claims that the documents were presented to Attorney Austin prior to submission to Tara, this Court finds that the evidence resoundingly suggests they were not.

Michelle Gagnon v. Joshua Gagnon

Mr. Carey testified that he signed some paperwork prepared by his father and transported it to the Rumford District Court for filing.[5] The paperwork included an entry of appearance and a motion to continue on behalf of Michelle Gagnon. After arriving at the courthouse, he noticed Joshua Gagnon (the defendant in the matter involving Michelle Gagnon) sitting in the waiting area. Mr. Carey approached him and engaged him in conversation.[6] The conversation clearly concerned substantive matters

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[2] Mr. Carey apparently has some manner of an ongoing relationship with Brandon; the subpoena to testify at the October 7, 2008, disciplinary hearing was personally served upon Tara by Brandon.

[3] Mr. Carey testified that he told Austin that he thought he was "off the case" at that time—an unsupportable assertion given the pendency of the contempt motion filed earlier by Austin.

[4] The second document purports to dismiss the contempt motion.

[5] Mr. Carey is engaged in a law practice partnership with his father.

[6] Mr. Carey testified that he knew Joshua from high school, but did not have a particularly good relationship with him as they traveled in different social circles. He testified that their conversation was just "killing time."

involving the pending proceeding. When Joshua's attorney noticed Mr. Carey speaking with Joshua, he admonished him to avoid contact.

Mr. Carey testified that he was unaware of the fact that Joshua was a party to the proceeding that was the subject of the paperwork he had signed and was filing with the court. He further testified that he was not aware that the subject matter of their conversation was germane to contested issues. While Mr. Carey's professed ignorance of these facts is arguably possible, it is not plausible.

The Judge Complaints (Judge McElwee)

District Court Judge John McElwee testified regarding the circumstances that lead to his filing of a complaint against Mr. Carey with the Board of Overseers of the Bar. During the course of the trial in the Burgess case, Mr. Carey offered the unsigned settlement agreement, noted above, into evidence despite the fact that it was completely inadmissible and improper. Judge McElwee noted additional inappropriate actions by Mr. Carey during the trial, including the mention of facts not in evidence during closing argument, and the use of inflammatory language (e.g., "lied" or "lies") that was simply not justifiable or appropriate in the context of the actual evidence. When Judge McElwee asked Mr. Carey to show opposing counsel the document he was using to question a witness, Mr. Carey refused and said he would show it to him later.

In order to avoid embarrassing Mr. Carey in the presence of his client, Judge McElwee called a recess to instruct Mr. Carey in chambers on the proper procedure for using documents to examine a witness (and the requirements of M.R. Evid. 106). Rather than accepting that gentle tutelage, Mr. Carey responded to the effect of, "How would you expect me to know that? You don't give me enough court appointments to learn these things."

The Judge Complaints (Judge Stanfill)

Judge Valerie Stanfill of the Maine District Court filed a complaint with the Board of Overseers of the Bar as a result of two circumstances that caused her to question Mr. Carey's core competence to handle representation in criminal matters. The first instance occurred during a trial on a motor vehicle offense. Diane Ronin was charged with operating after suspension. Although the Judge suspected some fundamental weaknesses in the State's case, Mr. Carey remained oblivious to them and undertook ineffective examination strategies.

During cross-examination of a police officer, his questions were primarily of the "Are you sure?" variety. During the direct examination of his own client, he repeatedly used leading questions despite repeated objections by the State's attorney, and the Judge's sustaining of those objections. Judge Stanfill was left with the clear impression that Mr. Carey was unaware of the nature and structure of leading questions and, equally as important, how to proceed without using them. The Assistant District Attorney who prosecuted the case testified that Mr. Carey "just froze" and could not question effectively.

The second event that prompted Judge Stanfill's concern occurred during a bail hearing in Farmington. After the prosecutor presented a request for cash bail, Mr. Carey responded that the bail requested for his client seemed a little high, but offered nothing else. Judge Stanfill inquired about his client's circumstances and other matters that might be germane to setting bail. Mr. Carey made no effort to offer circumstances that might mitigate the State's cash bail request.

Both the Assistant District Attorney and defense attorney Leonard Sharon, Esq., an expert called by Mr. Carey, testified that a competent defense attorney is not required to offer generic or gratuitous comments during a bail hearing, but that some manner of advocacy on behalf of the client is demanded.

Although Judge Stanfill testified that she did not believe any transgressions of constitutional magnitude occurred at the hearing, she sincerely believed that they could in the future, and she directed the Clerk of Court to refrain from appointing Mr. Carey to any future criminal defense matters.

Statements at Grievance Commission Proceedings

Assistant Bar Counsel cites two statements made in conjunction with the Grievance Commission proceedings that implicate violations of the Maine Bar Rules. First, when asked if he had had any contacts with law enforcement since an earlier incident that apparently occurred during a town meeting, Mr. Carey responded in the negative. In fact, he was charged by police with unrelated conduct that allegedly occurred in the interim.[7]

Mr. Carey rejects Assistant Bar Counsel's assertion. He argues that the question that prompted his denial was posed in the context of, or following, a question relating to his problems with law enforcement at town meetings. He argues that his answer was given in that limited context, i.e., that he had no subsequent contact with law enforcement at town meetings. The Court finds his answer and argument to be blatantly disingenuous. If his denial was intended to be made in a limited context, it should have been so stated. His unqualified answer clearly represented that he had had no contact with public safety officials in any circumstance. Counsel and the tribunal reasonably accepted it as such, and were thus misled.

As the Grievance Commission proceedings were concluding, the Commission received the complaints from Judges McElwee and Stanfill, prompting Assistant Bar Counsel to commence a "fast track" Motion for Temporary Suspension and Expedited Hearing. During the course of the hearings, Mr. Carey stated that he was going to wind down his practice and possibly undertake some additional study. On the strength of this representation, Assistant Bar Counsel assumed that the public would be protected by the fact that Mr. Carey would be voluntarily withdrawing from the active practice of law. In reliance upon Mr. Carey's statement of intent, Assistant Bar Counsel did not press forward with the motion, and focused her efforts on bringing the dispute to an

[7] Apparently the charge (assault) has since been dismissed.

agreed-upon resolution. In fact, Mr. Carey has continued to practice law and now characterizes his earlier representations as being merely "aspirational." Again, the Court finds his actions disingenuous.

Statements During Testimonial Hearing

During the course of his sworn testimony before this Court, Mr. Carey referred to Assistant Bar Counsel as "the most unethical lawyer I have ever met." He also suggested that there was a conspiracy, or at least complicity, between Attorney Austin and Judge McElwee in making the complaints against him and testifying at the hearing before this Court.[8]

Mr. Carey's testimony at the hearing was evasive, combative, and accusatory. He acknowledges no misconduct or deficiency on his part, and asserts that he will be a fine trial lawyer some day. During closing argument, his counsel pointed out that a disciplinary hearing can be a stress-inducing experience, and suggested that his client succumbed to the pressure and made some inappropriate statements, for which he apologized on behalf of Mr. Carey.

CONCLUSIONS

The Maine Bar Rules provide standards for attorneys with respect to their practice of the profession of law. When formal proceedings are commenced against an attorney pursuant to these rules, the purpose is not punishment, but protection of the public and the courts from attorneys who by their conduct have demonstrated that they are unable, or likely to be unable, to properly discharge their professional duties. M. Bar R. 2(a). All attorneys in the State of Maine are subject to the oversight and supervision of the Maine Supreme Judicial Court. M. Bar R. 1(a).

Rule 3.6(f) of the Maine Bar Rules governs communications with adverse parties, and provides as follows:

> **(f) Communicating With Adverse Party.** During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This rule articulates the long-recognized principle that a lawyer will not seek to communicate, in any fashion, with another lawyer's client on matters germane to the subject of the representation. If Lawyer A seeks to interact with Lawyer B's client on

[8] Mr. Carey testified that, "It's unfortunate that this [complicity] has not been explored further in this matter," and that he had seen Judge McElwee and Austin talking in the courthouse during the proceedings. When asked if he had any substantive evidence to support his complicity suggestions, he stated, "I have no evidence, but in this case, nothing would surprise me."

any issue related to Lawyer B's representation, he must go through Lawyer B. Any effort to avoid the requirements of this rule threatens to undermine the essence of the lawyer/client relationship.

Mr. Carey seeks to excuse his involvement in the presentation of the settlement documents to Tara Burgess by claiming that it was not him doing the contacting, it was his client, and litigants always have the prerogative of talking to each other. While he is correct on the second point, his involvement was not passive. His client may have provided him with the elements of the alleged agreement, but Mr. Carey actually prepared the legal document, complete with jurat and appropriate legal language. He was not a passive bystander, rather he actively facilitated, furthered, and participated in the process. Indeed, when the document was presented to Tara by Brandon, Mr. Carey was in communication with the parties through the speakerphone function of Brandon's cellular telephone.

Mr. Carey's failure to route the settlement documents that he prepared through opposing counsel constituted a clear violation of Rule 3.6(f). His conduct became all the more egregious when the second document was apparently presented to Tara after Attorney Austin expressed his disapproval over Mr. Carey's handling of the first one.

Mr. Carey's involvement in Brandon's machinations implicates another troubling violation of the rules. The District Court ordered Brandon to deliver the Jeep to Tara during the pendency of the proceedings. When Brandon refused to do so—perhaps as leverage to induce Tara to settle—Mr. Carey had a clear, solitary obligation: to advise Brandon to comply with the order forthwith. Indeed, Mr. Carey asserts that he did so advise Brandon. However, when he assisted in preparing the settlement proposal documents (which included dismissal of the contempt action against Brandon as a central objective), he facilitated his client's ongoing violation of the District Court's order in violation of Rule 3.6(d).

Mr. Carey's contact with Joshua Gagnon, which occurred shortly after the Burgess hearing, demonstrates his continuing disregard of the "no contact" rule. Again Mr. Carey seeks to minimize his transgression by asserting a lack of knowledge of the fact that Joshua was the opposing party on the case he was attending that day. The record clearly demonstrates that Mr. Carey signed the pleading entering his father's appearance. The parties' names appear on the pleading. The question of whether Mr. Carey's transgression was occasioned by ignorance or design concerns only the degree of his misconduct. His attendance at court on the date of the Gagnon hearing, while representing a party to that proceeding, charges him with the knowledge of the name of the opposing party. Mr. Carey's conversation with Joshua regarding matters clearly germane to the contested issues constituted a clear violation of Rule 3.6(f).

Mr. Carey's answer during the Grievance Panel hearing that he had no contact with law enforcement is simply a false statement. His efforts to distinguish it by invoking the "context" of the statement simply lacks credibility. His "cat and mouse" approach to Assistant Bar Counsel's questioning discloses a profound lack of candor

and a clear willingness to mislead counsel and the tribunal. His statement constitutes a violation of Rule 3.7(b).

The purpose of Mr. Carey's statement of intent to withdraw from the practice of law, while troubling, is less clear and falls short of a violation of the Maine Bar Rules. The Court is unable to determine on this evidence whether his statement was merely a momentary, fleeting thought or an intentional effort to divert Assistant Bar Counsel from the expedited procedures provided in Maine Bar Rule 7.3.

No judge expects a new lawyer to arrive at the practice of law with the same finely-honed skills that come only after years of experience. However, the rules clearly require (and judges and the public expect) all lawyers to demonstrate an understanding of, and competency in, the core skills required for representation. M. Bar R. 3.6(a)(1), (2). The deficiencies identified by the complaining Judges in this matter illuminate a lack of fundamental skills, competencies, and preparation in trial work in general, and criminal defense in particular. Accordingly, this Court finds that the Plaintiff has sustained its burden in proving violations of the aforementioned rules.

Finally, Mr. Carey's intemperate remarks suggesting unethical conduct on the part of the Board's counsel, and collusion between a Judge and an attorney, border on violations of Rule 3.7(b). However, this rule requires proof of a false statement knowingly made. In this instance, the element of a knowing misstatement may be missing because it appears Mr. Carey may actually, sincerely believe these assertions—an equally disturbing possibility, but not actionable under the rules.

ORDER

Upon this Court's finding of the violations of the Maine Bar Rules as noted above, it is hereby ORDERED that Seth T. Carey be SUSPENDED from the practice of law for a period of six months and one day commencing March 30, 2009. Pursuant to Rule 7.3(j)(1), he must thereafter petition for reinstatement. As a condition for reinstatement, he must demonstrate that he has undertaken further education in trial advocacy and professional ethics.[9] He must also demonstrate that he has obtained the services of an established trial attorney, not a relative or a member of his firm, with demonstrated expertise in trial and criminal defense advocacy to monitor and mentor him for a period of one year following reinstatement.

It is also ORDERED that Seth T. Carey pay the reasonable expenses of the Board incurred in the investigation and hearings necessitated in this matter. The Board's certification of costs and expenses will be considered separately from this proceeding.

The Board is authorized in its discretion to file additional Informations directly with the Court concerning any new complaints of professional misconduct allegedly committed by Mr. Carey during the year following his reinstatement to practice.

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[9] This education must be undertaken in a meaningful and formal instructional environment, not through self-study or prerecorded instructional videos.

The Clerk may enter this Order upon the docket by reference.

DATED: February 12, 2009

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Hon. Andrew M. Mead
Associate Justice
Maine Supreme Judicial Court