STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. BAR-09-04

BOARD OF OVERSEERS OF THE BAR,
Petitioner,

v.

MARSHA WEEKS TRAILL,
Respondent.

DECISION

PROCEDURAL HISTORY

On March 12, 2009, Respondent Marsha Weeks Traill filed a petition, pursuant to Maine Bar Rule 7.2(a), seeking review by a single Justice of the Law Court of a public reprimand imposed upon her on February 17, 2009, by Panel C of the Grievance Commission of the Maine Board of Overseers of the Bar. The public reprimand was issued upon a disciplinary petition submitted to the Grievance Commission on July 8, 2008, and was the subject of a public testimonial hearing conducted on December 8, 2008.

The petition for review was assigned to the undersigned Justice of the Maine Supreme Judicial Court on March 16, 2009. Oral argument was held on October 6, 2009, in Portland and the matter was submitted for decision upon the existing record.

FACTS

This Court's review is based upon the facts as found by the Grievance Commission Panel, all of which are supported in the record and none of which are clearly erroneous. Indeed, the parties do not challenge the Panel's findings on this review.

Marsha Weeks Traill is an attorney admitted to practice in the courts of the State of Maine. At all relevant times, she represented Mrs. J in a contentious divorce proceeding. Her husband, Mr. J, was represented by attorney Ray R. Pallas. Mrs. J suffers from bipolar and borderline personality disorders which are treated with prescription medications. Her mental health status was a central issue in the child custody aspect of the divorce proceeding.

As the date for a final contested hearing (April 12, 2006) drew close, the parties were engaged in seemingly promising settlement negotiations. On April 7, 2006, Mrs. J was admitted to the Spring Harbor mental health facility. Attorney Traill became aware of this admission on April 10, 2006, when members of Mrs. J's church reported this fact to her and advised that Mrs. J directed her not to disclose the fact of her hospitalization to Mr. J or his attorney.

Attorney Traill knew that Mr. J and his attorney would be very interested in her client's mental health status on the eve of the hearing date. She also knew that the disclosure of the hospitalization would likely sink the settlement negotiations

and force the matter to a contentious trial. Given this concern, and her client's direction to avoid disclosing the fact, she was certainly conflicted by how she would answer questions regarding her client's mental health status.[1]

Attorney Pallas did inquire about Mrs. J's status in a telephone call on April 10 and at the courthouse on April 12. Although his questions were posed in rather vague terms,[2] the import of the questions, as understood by both parties, was clear: What is the status of Mrs. J's mental health? Asked if there was anything to be concerned about, Attorney Traill answered something to the effect of: "Not that I am aware of." No mention was made of the in-patient hospitalization. Thus reassured, Attorney Pallas advised his client to proceed with the negotiated settlement, which involved shared parental rights and responsibilities and shared primary residence.[3]

DISCUSSION

Attorney Traill argues that the Panel, in finding that she violated Maine Bar Rules 3.2(f)(3)—engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; 3.2(f)(4)—engaging in conduct that is prejudicial to the

[1] Although the Panel's findings do not mention it, Attorney Traill advised her client that they would have to disclose the fact of the hospitalization if asked a direct question during the hearing.

[2] Neither party to the conversations can recall the verbatim language, but both agree it was something along the lines of: "Do we have anything to be concerned about?"

[3] Although the Panel's findings do not mention it, the verbatim record discloses that Mr. J discovered the fact of the hospitalization shortly thereafter when an insurance bill arrived. He immediately commenced proceedings in the divorce court to address his concerns.

administration of justice; and 3.1(a)—conduct unworthy of an attorney, effectively grafted a new obligation onto the rules that required her to violate Rule 3.6(h)—maintaining client confidentiality.[4] She argues that the Panel's ruling would have required her to disclose the fact of her client's hospitalization over the client's express direction not to do so.[5]

Attorney Traill is quite correct when she argues that an attorney has no duty to spontaneously disclose facts to opposing counsel that he or she knows the other attorney would like to know. Absent an order or legal obligation to disclose, parties are well within their rights to play their cards as close to the vest as they wish. Indeed, Rule 3.6(h) absolutely bars disclosure of client confidences unless authorized by one or more of the enumerated exceptions. In the absence of a valid discovery order or continuing duty to disclose, Attorney Traill had no obligation to respond to Attorney Pallas's inquiries.

The fact that Attorney Traill undertook to respond to the inquiry takes her out of the scope and protection of Rule 3.6(h). She simply could have, and arguably should have, declined to comment. When she did undertake to respond, Attorney Pallas was justified in believing that Attorney Traill was expressly not

[4] Bar Rule 3, abrogated and replaced by the Maine Rules of Professional Conduct (effective 8/1/09), was in effect at all relevant times.

[5] Although the Panel's findings do not mention it, Mr. J requested discovery, including medical reports, regarding Mrs. J's mental health during the course of the litigation. It is not clear on the existing record whether Mrs. J had a continuing duty to disclose her status pursuant to the discovery requests. Neither the parties nor the Panel have addressed this issue.

invoking any rule of confidentiality. He was entitled to believe that her answer would not be dishonest, fraudulent, deceitful, or otherwise misrepresentative. In fact, her answer, which avoided any mention of the obviously pivotal fact of the psychiatric hospitalization, was patently intended to misrepresent the gravity of the situation and keep the settlement viable.[6] It was deceitful.

The Panel reached the same conclusion in similar language:

> A determination of whether an attorney has fulfilled the obligations set forth in Rule 3.2(f)(3) should not depend on the parsing of words or a strained interpretation of precisely what was said. Attorney Traill knew that Mr. J would not go forward with the settlement agreement if he learned about his wife's hospitalization. While Attorney Traill may not have personally believed that the hospitalization was significant, she knew that her client's husband would have found it to be fundamentally important. By answering Attorney Pallas' question the way she did on April 12, 2006, Attorney Traill knew or should have known that she had provided Attorney Pallas and his client with a false sense of security which resulted in them moving forward with the settlement agreement without further inquiry.

When attorneys undertake to make affirmative statements in their capacity as attorneys, they are bound to do so within the parameters established by the rules. Attorneys are skilled in the use of language. While nothing prevents them from using those skills to argue and communicate effectively on behalf of their clients, there is no license for patently false statements or statements that employ strategic omissions to intentionally mislead. While those practices routinely occur in the

[6] Attorney Traill asserts that Attorney Pallas's inquiry was not sufficiently specific (i.e. he should have asked if Mrs. J had any recent hospitalizations) and she was entitled to withhold information based upon the inartful nature of the question. The Panel implicitly—and properly—rejected this argument.

rough-and-tumble world of the marketplace or human relations, they are beneath the dignity of the law.

Accordingly, as the Court finds no errors of fact or misapplication of law in the Panel's Report and Reprimand, it is hereby AFFIRMED.

Dated: October 16, 2009

/s/
Andrew M. Mead
Associate Justice
Maine Supreme Judicial Court