

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. BAR-04-1

BOARD OF OVERSEERS OF THE BAR)
)
 Plaintiff)
 v.)
)
 JOHN P. FRANKENFIELD)
)
 Respondent)

DECISION AND ORDER

The Board of Overseers of the Bar filed an Information against Respondent setting forth numerous factual averments and alleging violations of Maine Bar Rules 2(c), 3.1(a), 3.2(f)(2)-(4), 3.3(a), 3.5(b)(2), 3.6(a), 3.6(e)(1)-(3), and 3.7(a)(b).¹ In his answer, Respondent admitted many of the factual averments.

¹ The text of the Rules cited is as follows:

2 Purpose of Rules

(c) Grounds for Discipline. Each act or omission by an attorney, individually or in concert with any other person or persons, which violates any of these rules shall constitute misconduct and shall be grounds for appropriate discipline notwithstanding that the act or omission did not occur in the course of an attorney-client relationship or in connection with proceedings in court. The failure without good cause to comply with any rule, regulation or order of the Board or the Grievance Commission or to respond to any inquiry by the Board, the Grievance Commission or Bar Counsel shall constitute misconduct and shall be grounds for appropriate discipline.

3.1 Scope and Effect

(a) This Code shall be binding upon attorneys as provided in Rule 1(a). Violation of these rules shall be deemed to constitute conduct “unworthy of an attorney” for purposes of 4 M.R.S.A. Section 851 and Rule 7(e)(6)(A). Nothing in this Code is intended to limit or supersede any provision of law relating to the duties and obligations of attorneys or the consequences of a violation; and the prohibition of certain conduct in this Code is not be interpreted as an approval of conduct not specifically mentioned.

3.2 Admission, Disclosure and Misconduct

(f) Other Misconduct. A lawyer shall not:

- (2) engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects

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- (3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
 - (4) engage in conduct that is prejudicial to the administration of justice.

3.3 Fees; Fee Arbitration; Fee Division

(a) **Excessive Fees.** A lawyer shall not enter into an agreement for, charge, or collect an illegal or excessive fee. A fee is excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment of the lawyer;
- (3) The fee customarily charged in the locality for similar legal services;
- (4) The responsibility assumed, the amount involved, and the results obtained;
- (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer performing the services;
- (8) Whether the fee is fixed or contingent; and
- (9) The informed written consent of the client as to the fee agreement.

3.5 Withdrawal from Employment

(b) **Mandatory Withdrawal.**

- (2) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:
 - (ii) The lawyer knows, or should know, that the lawyer's continued employment will result in violation of these Rules;

3.6 Conduct During Representation

(a) **Standards of Care and Judgment.** A lawyer must employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services. A lawyer shall be punctual in all professional commitments. A lawyer shall take reasonable measures to keep the client informed on the status of the client's affairs. A lawyer shall not

- (1) Handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without first associating with another lawyer who is competent to handle it;
- (2) Handle a legal matter without preparation adequate in the circumstances, provided that, with respect to the provision of limited representation, the lawyer may rely on the representations of the client and the preparation shall be adequate within the scope of the limited representation; or
- (3) Neglect a legal matter entrusted to the lawyer.

(e) Preserving Identity of Funds and Property.

(1) All funds of clients paid to a lawyer or law firm, other than retainers and advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the state in which the law office is situated at a financial institution authorized to do business in such state.

No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay institutional service charges may be deposited therein; and

(ii) Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client; in that event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

(i) Promptly notify a client of the receipt of the client's funds, securities, or other properties;

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;

(iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render prompt and appropriate accounts to the client regarding them; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) Unless the client directs otherwise, when a lawyer or law firm reasonably expects that client funds will earn net interest, as defined in paragraph (7) of this subdivision, such funds shall be deposited in a client trust account that may be either.

(i) A separate, insured, interest-bearing account for the particular client or client's matter, the net interest on which will be paid or credited to the client; or

(ii) A pooled, insured, interest-bearing account with subaccounting by the financial institution or the lawyer or law firm, which will provide for computation of the interest earned by each client's funds and the payment or crediting of each client's net interest to the client.

3.7 Conduct During Litigation

(a) Improper Legal Action. A lawyer shall not file a suit, assert a position, delay a trial, or take other action on behalf of a client when the lawyer knows, or should know, that such action would merely serve to harass or maliciously injure another.

While this matter was pending, the Board moved to amend its information to add a third count alleging additional violations of Maine Bar Rules 3.1(a), 3.2(f)(1)-(4), 3.5(b)(2)(ii), 3.6(a), and 3.7(a).² The Court granted that motion. In light of his admissions and stipulations entered on the record, the parties agreed that it was unnecessary to conduct an evidentiary hearing before the Court on the charges filed by the Board. The averments and stipulations reveal the following:

1. On or about December 9, 1998, Frankenfield's grandfather, Wayne Frankenfield (Wayne), passed away.

2. On or about March 9, 1999, the Cumberland County Probate Court appointed Frankenfield as the Personal Representative (PR) of Wayne's estate.

3. On or about July 23, 2002, the Probate Court issued its general notice concerning formally probating Wayne's estate and Frankenfield's removal as the estate's PR.

4. On or about September 27, 2002, the Probate Court entered an order appointing Patricia Nelson-Reade, Esq., as visitor and independent supervisory attorney of Wayne's estate.

5. On or about October 28, 2002, and January 17, 2003, Nelson-Reade requested Frankenfield's assistance in accounting for Wayne's estate.

6. On or about February 14, 2003, Nelson-Reade filed her interim report regarding Wayne's estate stating that:

- a. Frankenfield repeatedly failed to return Nelson-Reade's telephone calls or respond to her written requests for information or even provide the names of the financial institutions in which he had deposited estate assets;

(b) Improper Concealment, Statement or Evidence. A lawyer shall not knowingly make a false statement, conceal information legally required to be revealed, or participate in the creation or preservation of false evidence.

² The text of these rules appears in Footnote 1 with the exception of Rule 3.2(f)(1):

(f) Other Misconduct. A lawyer shall not:

- (1) Directly or indirectly violate, circumvent, or subvert any provision of the Maine Bar Rules;

- b. Beginning in September 2000 Frankenfield had written a total of fifty-one (51) checks to himself with additional cash withdrawals by him from the account in the amount of \$11,352, all of those transactions being unexplained and unaccounted for by him;
- c. Frankenfield had utterly failed to cooperate with Nelson-Reade's investigation or otherwise satisfactorily explain to her his handling and disposition of the estate assets including the above-referenced funds;
- d. Frankenfield had not prepared any inventories or any interim accountings as ordered by the Probate Court; and
- e. Except for five cents (\$0.05), Frankenfield had completely exhausted and depleted the estate bank account.

7. Nelson-Reade's interim inventory of Wayne's estate establishes that at one time Frankenfield possessed and controlled at least \$166,583.90 of estate funds.

8. Frankenfield has failed to account either to estate beneficiaries, their counsel, Nelson-Reade, or to the Probate Court concerning his handling and disposition of the assets and funds controlled by him in the estate bank account at the Skowhegan Savings Bank.

9. Frankenfield has either converted the estate assets and funds to his own use or has failed to keep adequate financial records showing how he has handled and disposed of those funds and assets or both.

10. On or about November 25, 2002, Leigh R. Frankenfield (Wayne's brother) filed a grievance complaint against Frankenfield.

11. The Court finds that:

- a. Since his appointment as PR of Wayne's estate on March 12, 1999, Frankenfield consistently has refused to timely perform his duties as PR;
- b. Frankenfield repeatedly and consistently failed to communicate with estate beneficiaries or their counsel and has not rendered timely accountings of his handling and disposition of estate income and assets despite repeated requests by those estate beneficiaries, counsel, *and* the Probate Court;
- c. Despite his initial promise to do so, Frankenfield never timely resigned his position as the estate's PR;
- d. Frankenfield failed to timely develop a plan and schedule for distribution of estate assets to its beneficiaries and he falsely represented that he was close to doing so; and
- e. Any fees charged by Frankenfield to perform his duties as PR were excessive either because of his tardiness in doing the required work or because of his complete failure to do it.

12. On or about December 17, 2003 a Somerset Grand Jury indicted Frankenfield on criminal charges alleging that he had violated 17-A M.R.S.A. §§ 352, 353, 362 and 903 by his theft and misuse of estate assets with an aggregate value exceeding \$10,000.

13. On or about July 16, 2003, Dianne V. Dickey (Dickey) submitted a Fee Arbitration Commission Petition (Fee Petition) concerning her having paid Frankenfield \$1,000 to represent her in divorce proceedings.

14. Dickey's Fee Petition alleges the following facts:

- a. On or about May 2, 2003, she paid Frankenfield a \$1,000 retainer to represent her in divorce proceedings;

- b. On or about June 2, 2003, Frankenfield notified her that his attempted service of the divorce complaint and summons on her husband by mail was not successful, and that he was then going to have the Somerset County Sheriff's Office serve her husband in hand;
- c. On or about May 27, 2003, he claimed to have mailed Dickey a letter updating her on the status of her case, but she later confirmed with the North Anson Post Office that it had not received anything from Frankenfield by certified mail concerning service of process;
- d. On or about July 8, 2003, Dickey determined through telephone conversations with the Sheriff's Office that Frankenfield had never sent any divorce documents to serve on her husband; and
- e. On or about July 9, 2003, Dickey telephoned Frankenfield leaving a message which he never returned.

15. On or about August 13, 2003 Frankenfield responded by facsimile to Dickey's Grievance Complaint and:

- a. Admitted his neglect of Dickey's case by failing to ensure proper and timely service of process of her husband;
- b. Stated that he had no office help or staff to assist him in returning telephone calls; and
- c. Acknowledged that Dickey was entitled to a full refund of her retainer because Frankenfield had conferred "no value" to her.

16. On or about November 20, 2003, John W. Youney, Esq. (Youney), filed a complaint in the Somerset County District Court (Skowhegan) involving real estate, naming Frankenfield as a party defendant in the above case because as the closing agent he was holding \$55,267.02 of escrowed funds.

17. On or about January 12, 2004, Frankenfield answered Youney's complaint, *inter alia*, admitting that he was holding \$55,267.02 of escrowed funds.

18. On or about March 8, 2004, one of the parties, Burle Jones wrote Youney and Frankenfield proposing that the funds being held by Frankenfield be placed in escrow with the Court or in another trust account.

19. On or about April 14, 2004, Van W. Ames, President of Whitemore's Century 21 Real Estate Agency, informed Frankenfield that he had no objection to the transfer of the escrowed funds to the District Court.

20. On or about June 2, 2004, the District Court ordered Frankenfield within one business day to deposit with the Court all monies in his possession regarding the litigation including, but not limited to the \$55,267.02.

21. Frankenfield failed to obey the District Court's Order of June 2, 2004, and also failed to obey the District Court's further order of June 30, 2004, which extended the date by which he was required to pay the escrowed funds into the Court to July 8, 2004.

22. The Court concludes that:

- a. Frankenfield has failed to account to the District Court concerning his handling and disposition of the \$55,267.02 in escrowed funds as described above;
- b. Frankenfield improperly converted the \$55,267.02 in escrowed funds to his own use.

Frankenfield advised the Court that had it proceeded with an evidentiary hearing in this matter he would have invoked his privilege against self-incrimination. Although Frankenfield is entitled constitutionally to invoke the privilege, the court can draw adverse inferences against Frankenfield on the basis of that invocation. As we stated in *State v. Horton*, 561 A.2d 488, 491 (Me. 1989):

Disciplinary proceedings are civil in nature, and a lawyer has no constitutional right to prevent the factfinder in that proceeding from considering the implications of his silence, along with other evidence against him, in making a determination If he chooses to invoke his Fifth Amendment privilege and remain silent, a lawyer might be disciplined for the underlying misconduct charge by the Board

See also Board of Overseers of the Bar v. Charles Kadish, Docket No. BAR-96-17.

