

BOARD OF OVERSEERS OF THE BAR,)
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 Plaintiff)
)
 v.)
)
 JEFFREY J. CLARK, ESQ.,)
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 Defendant)

Decision and Order

This matter came before the Court upon the filing of an information by the Board of Overseers of the Bar. Hearings were held on December 5, 2007, and December 7, 2007, before the undersigned Justice of the Maine Supreme Judicial Court, pursuant to Rule 7.2(b)(2) of the Maine Bar Rules. The plaintiff was represented by Aria eee, Esq., and the defendant was represented by Karen Kingsley, Esq. The parties were afforded a full opportunity to present evidence at the hearings. Additional testimony was submitted through written transcripts by agreement. The parties submitted written memoranda in lieu of closing argument.¹

The threshold issue before the Court is whether Attorney Clark violated Rule 3.4(f)(2)(iv) when he prepared a will for his client, Eugenie B. Landry, that included an express bequest from her estate to him.² Landry executed the will on March 29, 2004. The evidence clearly establishes, and Clark admits, that these facts constitute a per se violation of the rule. Much of the hearing focused on the context of the preparation of the will and the factors to be considered in rendering a judgment pursuant to Rule 7.2(b)(5). Clark asserts he was ignorant of the prohibitions of the rule when he prepared the will and had Landry execute it. The

¹ The Board asserts that the defendant’s rebuttal memorandum was submitted late and asks the Court to exclude it from consideration. The Court declines to do so.

² Rule 3.4(f)(2)(iv) provides:

A lawyer shall not prepare an instrument giving the lawyer or a parent, child, sibling, or spouse of the lawyer any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

Board asserts that the execution of the will was the result of a knowing effort by Clark to wrongfully appropriate a client's assets to his own use.

Attorney Phillip C. Hunt, Esq., was offered by the Board as an expert witness. He testified that the rule prohibiting lawyers from drafting an instrument for a client that directly benefits the lawyer is present in all professional conduct rules.³ It is a well recognized, universal prohibition intended to protect clients from fraud and undue influence. He described it as a "very clear-cut, plain rule," which protects clients and the legal profession from circumstances where a conflict of interest impinges upon a lawyer's fiduciary role. He concluded that Clark's failure to secure independent legal advice for Landry prior to the execution of her will constituted a violation of the rule.⁴ Hunt confirmed the well established tenet that lawyers are presumed to be familiar with the rules governing the practice of law; Clark acknowledges as much in his answer.

FACTS

Jeffrey Clark has practiced law in the State of Maine since 1980. Approximately half of his legal practice involves residential real property work. The remainder consists of small entity creation, wills, and estates. He first met Landry in 1999 when he was contacted by a finance company to prepare a reverse mortgage for her. At the time, Landry owned a small but valuable oceanfront residence in York, but had little by way of cash savings. She sought the reverse mortgage as a way of obtaining funds to sustain herself through her later years.⁵

Landry had previously been employed as a secretary and nurse's aide at a hospital in New Hampshire. Although she claimed in later life to have been a nurse, it appears that she did not have an educational background in nursing and was never licensed. Elizabeth Melanson, the wife of Landry's nephew Donald Melanson, also worked at the hospital as the director of social work. Landry and her husband, Rene, purchased the York property and built a small house on that site over the course of several years; they eventually retired and relocated there.

³ Hunt testified that some states have enacted statutes which expressly render such gifts void unless the donor has received independent legal counsel prior to making the gift.

⁴ The fact that Clark's law partner met with Landry prior to the execution of the will does not meet the rule's requirement that the legal advice be truly independent.

⁵ Landry was approximately seventy-two years old when she began her association with Clark.

Shortly before her husband died in 1998, Landry was diagnosed with multiple sclerosis. Following Rene's death, Landry's health deteriorated and she became essentially housebound, leaving the residence only for medical appointments. She was increasingly dependent on neighbors and friends to meet her needs.

After Clark began his professional relationship with Landry, she apparently shifted her requests for assistance to him, and he basically met all her needs for sustenance and survival. Elizabeth Melanson and a few other family members had sporadic contact and visits with Landry, but by 2003 any contacts were few and far between. Family members were not aware of the marked deterioration in her condition. Melanson visited Landry in the summer of 2004, and attempted to contact her later in the autumn of 2004, but testified that her efforts were deflected by home health care workers that Clark had hired.

Landry was inconsistent in taking her medications, asserting that she had been a nurse and was able to regulate her medications without interference from others. Unfortunately, when she was non-compliant with the prescribed regimen, generally by failing to take medications, her condition would significantly worsen. She would become dehydrated, weak, constipated, and mentally disoriented. These conditions necessitated periodic hospitalizations to restore her to her previous tenuous state of health. After one hospitalization, she was transported to a nursing care facility at Clark's behest. She was very angry and dissatisfied with this accommodation, and eventually returned home.

All witnesses confirmed that Landry could be stubborn, irascible and occasionally mean spirited. Sometimes she would be quite lucid and engaging, but at other times she could be irrational, delusional, and would exhibit signs of dementia.⁶ Despite Landry's difficult demands and demeanor, Clark visited her regularly and undertook tasks as mundane as shopping for groceries, and as tedious as changing soiled bedclothes. He completed the reverse mortgage transaction and undertook several drafts of wills in which Landry changed beneficiaries regularly. As Clark became more and more integrated into Landry's daily life, he obtained powers of attorney to allow him to handle her financial affairs and make decisions regarding her medical care. Specifically, Clark testified that in 2003, because Landry's condition made it "mentally beyond her" to understand her financial

⁶ Landry frequently called the local police with various complaints including conspiracies against her (including conspiracy allegations against Clark). She attacked a health care worker with a knife and severely injured her.

affairs, it was necessary for him to take over paying her bills. Clark and his wife routinely called upon Landry for friendly visits.

Clark testified that in 2003 Landry first broached the idea of including him as a beneficiary in her will. He asserts that he was uncomfortable with this prospect and avoided the subject throughout the remainder of 2003. Clark further testified that in 2003, “She still had the capacity to make decisions when she was not in one of her downward spirals.”

Landry was hospitalized in March of 2004 after becoming dehydrated and possibly suffering a fall. Clark testified that she again raised the subject of including him as a beneficiary in her will during this hospitalization. With some misgivings, Clark drafted the will and had his law partner meet with Landry in the hospital prior to its execution. He states that he never came across the rule prohibiting this type of bequest and never sought an advisory opinion from the Board of Overseers of the Bar.

The medical notes from this hospitalization cast significant doubt on Landry’s mental clarity. At various times during the hospitalization she appeared confused, agitated, rude, and abrasive. The hospital note indicates that a staff member called Clark’s office and left a message regarding Landry’s circumstances. Although Landry was medically authorized to be released on March 30, 2004, the day after the will including Clark as a beneficiary was executed, she did not wish to return home at that time. She was reportedly agitated and angry at everyone. The nurse’s comments reflect that Landry’s moods were “volatile today at times then switching to very pleasant.” Shortly after her discharge, she was readmitted on April 26, 2004, presenting as “disoriented and confused,” stating that she was going to “call the cops,” and complaining that “the service at this hotel is terrible.”

After Landry was discharged from this hospitalization, Clark arranged for home health care services to provide workers for her daily living needs. He testified that he never instructed the workers to reject attempts by family members to contact Landry. He was in regular contact with Landry’s physicians as he exercised her medical care power of attorney. In May 2004, Clark secured twenty-four hour per day home health care coverage for her. Although her condition spiraled downward during 2004, Clark did not anticipate that her death was near.

On November 5, 2004, Landry was admitted to the hospital emergency room for a psychiatric evaluation after she physically assaulted her health care workers at home. The discharge diagnoses included “Alzheimer [*sic*] disease” and

personality disorder, among various other physical ailments. She was apparently declared medically incompetent. Landry was hospitalized again on December 2, 2004, after slashing a health care worker's face with a knife; she was discharged the following day with a diagnosis including delirium, and "blue papered" to the Maine Medical Center for a psychiatric workup. After a final admission to the York Hospital, Landry died on January 30, 2005.⁷

Clark telephoned relatives to report Landry's death, and arranged a funeral held on February 12, 2005, in Manchester, New Hampshire. He paid her bills and resolved the reverse mortgage. He moved swiftly to process Landry's estate through the informal probate process. The house was sold in June 2005; the estate received net proceeds of \$524,000 from the sale. Clark ultimately took \$325,000 from the estate.⁸ He used the money to cover his children's tuition costs and to pay off his mortgage.⁹

Upon objections by several interested parties, the York County Probate Court ordered the estate to remain open and accepted Clark's resignation as personal representative. The court appointed Eileen Epstein, Esq., as the successor personal representative. Although Clark was initially resistant to the suggestion that he should refund the \$325,000 to the estate, he apparently had a change of heart and has fully refunded this amount as of the dates of this hearing.

DISCUSSION

If Clark had not prepared a will for Eugenie Landry designating himself as beneficiary, his actions would have been reflective of the highest ideals of the legal profession. In addition to the usual legal services rendered to a client, he undertook to insure her welfare and well-being. He went far above and beyond the call of duty in ministering to a troubled and infirm elderly woman. Unfortunately, all of his otherwise noble and selfless gestures were vitiated by his blatant, per se violation of one of the most well established prohibitions against conflicts of

⁷ On January 28, 2005, a medical order was issued by Dr. Gagnon indicating that the hospital "will not provide hydration or alimentation as that would be against her expressed wishes."

⁸ Clark continued to draw funds from the estate even after a complaint was filed citing the impropriety of his participation in its distribution.

⁹ After paying off the mortgage on his residence, he conveyed the entire fee ownership to his present wife (whom he married in 2002), apparently over concerns of possible civil claims against himself or the estate.

interest. His claims of humanitarian service, based upon Christian ideals, are rendered hollow by his participation in his client's estate.

The Board suggests that Clark's actions were indicative of a predatory, premeditated plan to ingratiate himself into Landry's affairs, and to secure a share of her estate at a time when she was utterly dependent upon him and probably not completely lucid. While that argument can be made on these facts, the Court declines to accept it entirely. The Court finds somewhat credible Clark's assertion that he became overly emotionally involved with Landry and developed a mother-son relationship with her. When the prospect of sharing in her estate arose, he likely felt some entitlement as a dutiful son might. However, as Landry's attorney his primary obligation, and only legal relationship, was a fiduciary one. This relationship clearly prohibited him from profiting as a beneficiary under the will he prepared. Hence, his stated discomfort over the prospect of being included in Landry's will was well founded.

Regardless of Clark's motivation at the time of the act, no emotional condition can justify it and no claim of ignorance can excuse it. It was a defalcation of major proportions and cannot be taken lightly by the Court. An appropriate disposition must include some period of monitoring to make certain that Clark's claimed emotional susceptibility to elderly clients will not cloud his professional judgment in such matters in the future.

CONCLUSIONS OF LAW

The Court finds that Attorney Clark's conduct violated Maine Bar Rules 3.1(a) (conduct unworthy of an attorney); 3.2(f)(1) (conduct violating any provision of the Maine Bar Rules); 3.2(f)(4) (conduct that is prejudicial to the administration of justice); 3.4(b)(1) (conflict of interest); and 3.4(f)(2)(iv) (preparing an instrument giving the lawyer a substantial gift from a client including a testamentary gift).

SANCTIONS¹⁰

Recognizing that the primary purpose of attorney discipline is not punishment, but protection of the public, the Court hereby ORDERS the following sanctions:

¹⁰ Although Clark was the subject of one prior complaint before the Board of Overseers of the Bar, it was dismissed and will not be considered a prior violation for the purposes of these sanctions.

(1) Jeffrey J. Clark is reprimanded for his aforementioned violations of the Maine Bar Rules;

(2) Jeffrey J. Clark shall be suspended from the practice of law for a period of thirty (30) days from April 1, 2008, through April 30, 2008;

(3) Jeffrey J. Clark shall, for a one-year period commencing February 1, 2008, provide to Bar Counsel:

(a) The names and addresses of all clients, aged sixty (60) years or more; the lists shall be provided on the first day of each month and shall include a brief description of the legal services rendered to the client within the month preceding the report; and

(b) Upon specific request of Bar Counsel, Jeffrey J. Clark shall provide copies of any written instruments prepared for said clients as identified in the monthly reports;

(4) Nothing in this Order shall constitute a judicial waiver of the attorney-client privilege; Bar Counsel shall maintain complete confidentiality of any information or legal instruments produced pursuant to this Order and no aspect of said materials may be disclosed in any public fashion without prior order of the Court.

Dated: January 24, 2008

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