

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. BAR-07-10

BOARD OF OVERSEERS OF THE BAR )

)

v. )

)

ORDER AND SANCTION

GORDON AYER )

of Kennebunk, Maine )

Me. Bar No. 1863 )

The complicated and protracted history of this case began in October 1998 with a complaint to the Board of Bar Overseers (Board) against Attorney Gordon Ayer. The complainant, Margaret B. Spenlinhauer, alleged that, in the course of his representation of her husband, John E. Spenlinhauer III, during the litigation of their Massachusetts divorce, Attorney Ayer had violated multiple bar rules and should be disciplined. At Attorney Ayer's request, the investigation of his alleged misconduct was stayed for approximately seven years while the Spenlinhauers' divorce was pending.<sup>1</sup>

This complaint, along with a second complaint by Ms. Spenlinhauer were reviewed and litigated in Maine between 2005 and 2007. After Attorney Ayer and bar counsel agreed to waive further hearings before the Board's Grievance Commission, this Court accepted jurisdiction over the matter and now addresses

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<sup>1</sup> At that time, the divorce proceeding had been pending in Massachusetts since 1988. Attorney Ayer was admitted *pro hac vice* to represent Mr. Spenlinhauer in 1996.

three issues: (1) whether Ms. Spenlinhauer can intervene in this disciplinary proceeding; (2) whether Attorney Ayer violated the Maine Bar Rules; and (3) if Attorney Ayer did violate any rules, how he should be sanctioned.

### PROCEDURAL HISTORY<sup>2</sup>

Attorney Ayer first responded to Ms. Spenlinhauer's 1998 complaint in September 2005. In October 2005, Ms. Spenlinhauer filed a supplemental complaint with the Board. Although neither Attorney Ayer nor his counsel received a copy of that second filing from the Board at any time in 2005, when the Grievance Commission undertook its evaluation of the case in late 2005, it considered the assertions made by Ms. Spenlinhauer in 2005, as well as those made in 1998. Based upon its review of Ms. Spenlinhauer's complaints and Attorney Ayer's response to the first complaint, the Grievance Commission panel found probable cause to believe that Attorney Ayer had engaged in misconduct in April 1998, based on the actions he took after discovering that his client had been giving him false information. The panel found that Attorney Ayer's handling of this information warranted sanction under the Maine Bar Rules. The screening panel directed bar counsel to prepare a disciplinary petition limited to those actions in 1998 and to present it to a different panel of the Grievance Commission.

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<sup>2</sup> The factual findings are taken from those portions of the Information that Attorney Ayer admitted and from the Stipulation filed by the parties on October 15, 2008.

On August 13, 2007, that second panel presided over a stipulated disciplinary hearing during which the Board and Attorney Ayer proposed a negotiated settlement. Ms. Spenlinhauer attended that hearing and made a lengthy presentation, expressing her dissatisfaction with and opposition to the proposed settlement. In September 2007, the panel informed the Board, Attorney Ayer, and Ms. Spenlinhauer that it had not accepted the proposed settlement. The panel set the matter for a supplementary hearing.

At that time, Attorney Ayer elected to forego the supplementary hearing and requested that bar counsel consent to a stipulated waiver of further Grievance Commission proceedings, in order to proceed directly to this Court for a de novo hearing on the disciplinary complaint. Ms. Spenlinhauer notified the Board of her objection to this available procedural process. After consideration of Attorney Ayer's request, bar counsel consented, and the parties filed a request that the Court allow them to waive further Commission proceedings. The Court granted that joint request on December 19, 2007, and accepted jurisdiction over this matter.

On July 11, 2008, Bar Counsel filed an Information against Attorney Ayer, pursuant to M. Bar R. 7.2(b), alleging that he had violated a series of bar rules after learning in April 1998 that his client had been misrepresenting the characterization of a bank account during the course of the divorce proceedings. Attorney Ayer responded to the Information on August 15, 2008. The Court met with counsel on September 3, 2008, at which time counsel indicated that Attorney Ayer recognized

that his actions would support a determination that he violated the Maine Bar Rules. Counsel and the Court then established a procedural schedule. In accordance with that schedule, the Court ordered counsel to file a stipulated factual record and position letters by October 6, 2008. The Court's order also indicated that no argument would be scheduled if the written submissions were sufficient to permit the Court to determine the case.

On October 7, 2008, Ms. Spenlinhauer filed a motion to intervene in the court proceeding. In her motion, and in the submissions she filed in support of that motion, Ms. Spenlinhauer asserts that both the Board of Bar Overseers and bar counsel have chosen to ignore most of her complaints concerning Attorney Ayer. She argues that she should be allowed to intervene in order to correct inaccurate assertions and to bring certain matters before the Court that otherwise would not be presented. Additionally, Ms. Spenlinhauer demands that the Court dismiss this proceeding and order the Board of Bar Overseers to retain independent counsel to undertake a review of all of the complaints. Both Attorney Ayer and bar counsel filed objections to Ms. Spenlinhauer's motion to intervene. For the reasons explained below, the Court denies her motion.

#### FINDINGS OF FACT

1. At all times relevant hereto, Defendant Gordon C. Ayer, Esquire of Kennebunkport, County of York, State of Maine was an attorney duly admitted to and engaging in the practice of law in the State of Maine and subject to the Maine Bar Rules.

2. Attorney Ayer is in private practice in Kennebunk, Maine. At the time of the conduct at issue in this case, Attorney Ayer was corporate counsel to Spencer Press of Wells, Maine.

3. An owner of Spencer Press,<sup>3</sup> John E. Spenlinhauer III (John) was engaged in divorce proceedings with Margaret B. Spenlinhauer. The divorce action was commenced by Ms. Spenlinhauer in the Massachusetts Probate and Family Court in 1988.

4. John's interest in Spencer Press, a commercial printing enterprise, was a significant marital asset; John's financial status and the valuation of his ownership interest in the enterprise were matters of dispute in the divorce proceeding.

5. By agreement, the divorce action was referred to arbitration. The assigned arbitrator heard the case in 1991; issued a draft of proposed findings and decision in 1993; and released final findings and decision in early 1998.

6. Thereafter, Massachusetts counsel acting for John brought a motion before the Probate Court in Massachusetts to have the arbitrator's final findings and decision adopted by the Court.

7. After John's Massachusetts divorce counsel was suspended from the practice of law for matters unrelated to the divorce proceedings, Attorney Ayer was admitted *pro hac vice* with the Massachusetts Probate and Family Court.

8. Within days after the arbitrator issued his final findings and decision, Ms. Spenlinhauer obtained additional bank documents, which she had been seeking for years, for an account that she asserted was relevant to the divorce, Account No. 01-8708-9 at Massachusetts Bank and Trust Company, referred to during the Spenlinhauer divorce litigation as the "-9 account." The funds in that account derived primarily from checks issued to Spencer Press from United Paper Stock Company, a Rhode Island waste paper processor. The documents had been tied up in an unrelated proceeding involving the Bank.

9. The bank documents obtained supported Ms. Spenlinhauer's assertion that the -9 account was a business account owned by Spencer Press. Throughout

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<sup>3</sup> Spencer Press of Massachusetts, which was partially owned by John Spenlinhauer, owned the shares of Spencer Press of Maine, Inc. For convenience, both entities will be referred to as "Spencer Press." John and his brother, Stephen P. Spenlinhauer, were the principal owners of Spencer Press.

the divorce proceedings, John had consistently maintained that the -9 account was the personal account of his brother Stephen P. Spenlinhauer (Stephen). John represented that he had no interest in and derived no benefit from the -9 account. It was not until after Attorney Ayer learned the true nature of the account from a third party that John admitted that it was a business account owned by Spencer Press and that it benefited him.

10. On March 27, 1998, based primarily on the new information about the -9 account, Ms. Spenlinhauer filed a motion in the Probate Court to reopen and recommit the matter to arbitration.

11. After reviewing Ms. Spenlinhauer's motion, Attorney Ayer made inquiries of John, Stephen and the Company's accountant, John Parent (Parent). At that time, all three maintained that the -9 account was Stephen's personal account.<sup>4</sup>

12. Attorney Ayer drafted a memorandum to the Probate Court, including supporting affidavits from John, Stephen, and Parent in opposition to Ms. Spenlinhauer's motion and in support of John's motion to confirm the arbitrator's award.

13. In the affidavits signed by John and Stephen, and in his memorandum, Attorney Ayer described the -9 account as "owned, maintained and controlled" by Stephen.

14. The response deadline to serve a reply to Ms. Spenlinhauer's motion was Thursday, April 23, 1998. A hearing on both parties' motions was scheduled for Monday, April 27, 1998.

15. On April 23, 1998, Edmond Nugent, an independent director<sup>5</sup> of Spencer Press, asked Parent about the controversy surrounding the -9 account. That afternoon, Parent and Nugent reached Attorney Ayer on his cellular phone while he was driving to Boston to serve and file John's responsive pleadings to Ms. Spenlinhauer's motion. During that call, Parent told Attorney Ayer the truth about the ownership of the -9 account.

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<sup>4</sup> In later proceedings, all three admitted those representations to Ayer were untrue.

<sup>5</sup> The Board of Directors of Spencer Press comprises three members, John, Stephen, and Edmond Nugent.

16. As a result of the phone call, Attorney Ayer drove to the Boston office of Attorney Walter May, who had previously represented John in the divorce. Both John and Stephen were in Florida at the time. Attorney Ayer was unable to reach John, but he contacted Stephen, who confirmed Parent's information about the account.

17. While at May's office, Attorney Ayer altered the first page of both affidavits to remove the word "owned" from their description of the -9 account. Attorney Ayer then printed the revised pages, which indicated that Stephen "maintained and controlled" the -9 account, and substituted the revised pages for the original first pages in the previously signed affidavits. Attorney Ayer did not modify his memorandum. John subsequently confirmed and ratified the change to his affidavit.

18. Attorney Ayer made no supplemental filings with the court during the two business days available to him before the hearing.

19. On April 27, 1998, while arguing John's motion to confirm the arbitration award and opposing Ms. Spenlinhauer's request to reopen the case. Attorney Ayer informed the court that Stephen Spenlinhauer was not the owner of the -9 account; that it was a business account of Spencer Press. Ayer stated the following in open court:

I would, however, like to point [out] something else[.] [T]hat it's my position for the record and hopefully for all time that this account at Mass. Bank & Trust was a corporate account. If Stephen Spenlinhauer calls it a personal account, I think he's wrong. If John Spenlinhauer calls it a personal account, I think he's wrong. It was a corporate account. It was maintained and controlled by Stephen Spenlinhauer. I don't believe he owned it. The funds that flowed into that account were the funds of Spencer Press.

20. Attorney Ayer also argued on April 27, 1998, that the diversions to the -9 account, the total amount of which was discussed on the record, should be characterized as "insignificant" when considered in light of the gross revenues of Spencer Press for the years in question.

21. In October 1998,<sup>6</sup> Ms. Spenlinhauer filed a second complaint against Attorney Ayer. Her two-part complaint was later supplemented by an additional filing through her counsel in August 2005. The August 2005 filing was not timely forwarded to counsel for Attorney Ayer; he did not receive it until October 16, 2007. However, Ayer's counsel notified the Board of Ayer's waiver of any procedural errors committed by the Board.

22. Attorney Ayer filed brief responses to the 1998 complaint and, for several years, declined to answer the complaint more fully due to confidentiality issues relating to the pending Spenlinhauer divorce litigation. Throughout those years, and pursuant to Board Regulation #12, the Grievance Commission's preliminary review panel met and repeatedly deferred completion of its review of the Ayer complaint matter. In September 2005, Attorney Ayer retained counsel and provided a full response to the 1998 complaint. When they filed that written response, neither Attorney Ayer nor his attorney was aware of the 2005 filing.

23. Despite the lack of response from Attorney Ayer to Ms. Spenlinhauer's 2005 filing, the preliminary review panel finalized its evaluation of both the 1998 filing and the 2005 filing. The only issue that the panel authorized for further disciplinary proceedings was related to Ayer's actions in response to the new information about the -9 account and to Ms. Spenlinhauer's motion to reopen the divorce arbitration. Accordingly, the panel directed Bar Counsel to prepare and file a formal disciplinary petition for a hearing before a different panel of the Grievance Commission. All of Ms. Spenlinhauer's other allegations were effectively dismissed.

24. Bar Counsel filed a disciplinary petition against Attorney Ayer on April 4, 2007. Bar Counsel and Attorney Ayer negotiated a stipulated resolution and presented it to the Grievance Commission panel at a hearing in August 2007. Ms. Spenlinhauer attended that hearing, and the panel permitted her to make a presentation objecting to the parties' proposed resolution.

25. In September 2007, the panel issued a decision declining to accept the parties' proposal. Because some panel members had lingering questions, the panel set the matter for a supplementary hearing. At that point, Attorney Ayer elected to pursue a waiver of further Grievance Commission hearings. Bar Counsel consented to his request, and this Court approved the waiver and accepted jurisdiction over the matter in December 2007.

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<sup>6</sup> Ms. Spenlinhauer filed her first complaint against Attorney Ayer alleging interference with justice in 1992. The Grievance Commission dismissed that complaint in November 1992.



## CONCLUSIONS

### A. Procedural Issues

This matter is before the Court pursuant to M. Bar R. 7.2(b), by agreement of the parties to this proceeding. The parties are the Board of Overseers of the Bar and Attorney Ayer. The Maine Bar Rules permits them, as parties to the proceeding, to agree to bypass the complete Grievance Commission process and give jurisdiction to the Court. This procedural decision can be made at the commencement of the action, *see* M. Bar R. 7.2(b)(7), or, as is the case here, at some point in the middle, *see* M. Bar R. 7.2(b)(7).

Although Ms. Spenlinhauer's complaints against Attorney Ayer initiated this action, she is not a party to this proceeding. *See* M. Bar R. 7.2(b)(2) ("The Board shall be treated as the plaintiff and the respondent attorney as the defendant . . ."). As a non-party, Ms. Spenlinhauer's role is important, but limited. The Board's decision to consent to Attorney Ayer's request that the matter be referred to the Court was the Board's alone to make, based upon whatever information it deemed important.

### B. Motion to Intervene

As noted above, Ms. Spenlinhauer filed a motion to intervene in this proceeding in order to correct what she alleges are false assertions and to bring forth issues that she deems important and that the parties have not addressed. In

her submissions, however, she failed to provide any citation to a rule, a statute, or even a case that might support her position. The Board of Overseers of the Bar, comprising six attorney members and three lay members, is charged with enforcing attorney compliance with the Maine Bar Rules. To carry out that duty pursuant to the Rules, the Board retains bar counsel to act as its investigator and prosecutor on disciplinary matters, and creates a Grievance Commission to conduct hearings on those matters presented to it by bar counsel.

Contrary to Ms. Spenlinhauer's assertions, all of her complaints against Attorney Ayer were investigated by bar counsel and were considered by a panel of the Grievance Commission. In fact, the 2005 complaint was evaluated without any counter arguments from Attorney Ayer. After review, the panel determined that not all of her allegations warranted additional disciplinary action. Those allegations that were found by the panel to warrant disciplinary action are now before the Court.

As the person who brought Attorney Ayer's actions to the attention of the Board of Bar Overseers, Ms. Spenlinhauer's position is analogous to that of a named victim in a criminal proceeding. While the Court appreciates that she is not satisfied with the reviewing panel's judgment of her complaints, it is nonetheless within the Board's discretion to decide which allegations to prosecute. Ms. Spenlinhauer's motion to intervene is denied.

### C. Attorney Ayer's Actions

As the recitation of the facts above indicates, by the time Attorney Ayer filed his responses to Ms. Spenlinhauer's motion for reconsideration, he knew that the information previously provided to him by his client about the status of the -9 account was false. He also knew that because his client had provided that same false information to Ms. Spenlinhauer and to the arbitrator who had handled their divorce, Ms. Spenlinhauer's motion to reopen and recommit the matter to arbitration had merit.

By filing the altered—but still misleading—affidavits, and by failing to *immediately* notify the court of his client's falsehood in this clear case of a prior and attempted continuing fraud on the Court, Attorney Ayer violated M. Bar R. 3.2(f)(3), 3.2(f)(4), 3.7(b), and 3.7(e)(1)(i). The Court notes, however, that during the hearing on Ms. Spenlinhauer's motion two days later, Attorney Ayer did notify opposing counsel and the court of the true status of the -9 account. In so doing, he ended the fraud perpetrated by his client.

The question, then, is how the Court should respond to Attorney Ayer's violation of the Maine Bar Rules after learning of his client's misrepresentation of a material fact.

### SANCTION

It is agreed by the parties and now so found by the Court that Attorney Ayer engaged in professional misconduct. He engaged in conduct, although short-lived,

