STATE OF MAINE

SUPREME JUDICIAL COURT DOCKET NO. Bar-10-11

BOARD OF OVERSEERS OF THE BAR
Petitioner

v.

DAVID E. WARREN

JAMES T. KILBRETH, III

ERIC D. ALTHOLZ

MARK K. GOOGINS

ROGER A. CLEMENT, JR.

JULIET T. BROWNE
Respondents

FINDINGS, CONCLUSIONS AND ORDER

This matter is before the Court for decision, after hearing, on an Information filed by the Board of Overseers of the Bar on September 2, 2010. The Information alleges that the six named respondents committed violations of Maine Bar Rule 3, the Code of Professional Responsibility, related to their alleged failure to investigate, discover, report, and mitigate (1) losses to the firm of Verrill Dana and clients of the firm, and (2) misconduct of a former partner, who committed thefts from the firm and from clients of the firm.

The thefts from clients and the firm occurred over a period of nearly ten years, from September 1997 to January 19, 2007. The ethical violations allegedly occurred between June 2007 and November 2, 2007. During this period, ethical obligations of Maine attorneys were established in the Code of Professional Responsibility, Maine Bar Rule 3, which has been replaced by the Maine Rules of Professional Conduct, effective August 1, 2009.

I. STANDARDS OF EVIDENCE AND RULES OF INTERPRETATION

In bar disciplinary actions before this Court, the Board of Overseers of the Bar has the burden to prove ethical violations by a preponderance of the evidence. M. Bar R. 7.2(b)(4). The Court's review of the evidence is de novo, without deference to any findings or recommendations by the Board or a Grievance Commission panel. M. Bar R. 7.2(b)(3); *see also Bd. of Overseers of the Bar v. Dineen*, 481 A.2d 499, 502 (Me. 1984).

That being said, it is important to note that, in this case, there are few material facts that are really in dispute. Rather, the issues for the Court to decide in relation to the alleged ethical violations are whether, based on the facts as the respondents knew or believed those facts to be, they had ethical obligations to initiate a more prompt and thorough investigation of the facts and to report those facts to the Board more promptly than occurred in this case.

The Bar Rules do not directly specify the standards by which allegations of ethical violations must be evaluated. However, those standards are suggested in various interpretive aids explaining the Rules and Amendments to the Rules. Thus, the Reporter's Notes addressing the reporting obligation established in Rule 3.2(e)(1), a central issue in this case, indicate that "the duty of disclosure extends to knowledge of a violation of any of the Bar Rules," and that the two paragraphs of the Rule "treat knowledge subjectively and neither imposes any duty to investigate."[1] An Advisory Committee Note to a 1984 amendment to Rule 3.2(e)(1) notes that, with the amendment, "only violations raising a substantial question of professional fitness need be reported," and that "[a] measure of judgment is, therefore, required in complying with the provisions of the new rule."[2]

The Preamble from the Maine Task Force on Ethics that introduces the new Maine Rules of Professional Conduct also provides some useful guidance. While the Preamble and the Rules of Professional Conduct were not in effect at the time of the violations alleged here, paragraph 19 of the Preamble reflects and continues the previously existing standards for evaluation of allegations of ethical violations. Thus paragraph 19 of the Preamble states:

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[1] *1 Maine Manual on Professional Responsibility* 3-35 (2007 ed.). Paragraph (1) of Bar Rule 3.2(e) addresses reporting attorney misconduct; paragraph (2) addresses reporting judicial misconduct.

[2] *Id*. at 3-43.

> Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

II. ETHICAL VIOLATIONS ALLEGED

The Information alleges that the following provisions of the Code of Professional Responsibility were violated by one or more of the attorneys who are subject to the Information:

1. Bar Rule 3.1(a) stating that any violation of any other provision of the Code of Professional Responsibility shall be deemed to constitute conduct "unworthy of an attorney" for purposes of 4 M.R.S. § 851 (2010).

2. Bar Rule 3.2(e)(1) requiring that a lawyer knowing of a violation of the Maine Bar Rules "that raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer shall report such knowledge to the Board or other appropriate disciplinary authority."

3. Bar Rule 3.2(f)(2), (3), and (4) requiring that a lawyer not engage in "illegal conduct" "that adversely reflects on the lawyer's honesty, trustworthiness,

or fitness as a lawyer"; or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or engage in conduct "prejudicial to the administration of justice."

4. Bar Rule 3.13(a)(1), (2), and (3) requiring: (1) partners in a law firm to make "reasonable efforts" to assure that the firm has in effect measures giving "reasonable assurance" that all lawyers in the firm conform to the Code of Professional Responsibility; (2) that lawyers having "direct supervisory authority" over other lawyers shall "make reasonable efforts" to insure that the other lawyers conform to the Code of Professional Responsibility; and (3) that a lawyer shall be responsible for another lawyer's violation of the Code of Professional Responsibility if the lawyer orders, or with knowledge of specific conduct ratifies, the conduct involved, or the lawyer knows of conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable, remedial action.

III. ISSUES NOT ADDRESSED IN THIS DECISION

The Information alleges violation of two other Bar Rules. However, the Board's post-hearing brief indicates that, after consideration of the evidence, the Board is not seeking a finding of a violation of Bar Rule 3.6(i), which requires that a lawyer who knows or should know that the lawyer's opinion or advice may be communicated to a person who was not a client of the lawyer take reasonable steps

to prevent that other person from believing that the lawyer represents that person's interests. The Board's brief also indicates that it is not seeking a finding of a violation of Bar Rule 3.13(b)(1) which states that a lawyer is bound by the Code of Professional Responsibility notwithstanding the fact that the lawyer acted at the direction of another person. Those issues are not addressed further in this decision.

There are two other issues that have been raised in some of the materials filed with the Court or in complaints filed against the respondents that are not supported by the evidence, and will not be addressed further in this decision. First, there is no credible support for any claim that, in accepting and placing into a Verrill Dana partnership account a payment of funds for checks written from the Janice Thomas estate account, any respondent committed, approved, or ratified a criminal or illegal act by taking what he or she knew or believed to be client funds and converting those funds to the firm's use.

Second, there is no credible support for any claim that Ellie Rommel was terminated from, or refused the opportunity to return to, her position at Verrill Dana in retaliation for her reporting to Verrill Dana attorneys the misappropriation of funds that led to this Information. In fact, Rommel's testimony in this proceeding and e-mails that she sent after conversations with David Warren are contrary to such a position. The evidence establishes that Rommel was invited to

return to Verrill Dana and declined for personal reasons and because of discomfort with the prospect of occasional, incidental contact with John Duncan.

IV. MATERIAL FACTS

The Court finds the following facts, based on the testimony and exhibits admitted into evidence.

At all times material to this case, John Duncan was a partner at Verrill Dana. He was widely respected throughout the firm as an individual of unquestioned—at the time—honesty and integrity and one who often assumed firm-wide responsibilities, serving as a "bridge" between various groups in the firm because of his personal style and firm-wide respect. Duncan also was involved in a number of activities in the greater Portland community and was widely respected in those community activities. Duncan had joined Verrill Dana out of law school in 1978 and, until the revelations that gave rise to this case, was viewed in the firm and the community at large as a person above reproach.

Between late 1997 and January 19, 2007, on many occasions, Duncan committed thefts of funds from the firm and from clients of the firm. He accomplished this using his authority as a fiduciary, trustee, or power of attorney on various client accounts to write checks on those accounts to himself, mostly, purportedly, for fees due to the firm for his work on the accounts. In many instances, however, checks were written when no attorney services had been

performed or the amount of fees charged to the accounts was significantly excessive in relation to the legal services performed. In some instances, the fees reflected in checks written by Duncan to himself bore some relation to the services he had performed for the client or the account.

The Verrill Dana partnership agreement required that all such fees earned or payments from clients in connection with legal services—at least those services performed by Duncan—be paid into Verrill Dana partnership accounts. Duncan did not pay these fees into Verrill Dana partnership accounts, although check registers he prepared indicated payments to Verrill Dana rather than to himself.

Duncan was an attorney in Verrill Dana's private clients group, formerly, the trusts and estates group, where his principal responsibilities were administering and providing legal services to trusts' and estates' accounts. For some period of time, Duncan had headed up this division of Verrill Dana. However, by 2007, another attorney, Kurt Klebe, was the head of the private clients group.

In 2005 and 2006, Verrill Dana was developing some new practices to assure better oversight of funds managed by the private clients group. These practices were gradually applied to client accounts, but had not been applied to the accounts from which Duncan misappropriated funds. The new practices included a requirement that there be two signatures on checks written on client accounts, and more centralized practices for billing and collections that would have assured

greater oversight and accountability of what was billed and paid for legal services. Had these procedures been applied to the accounts from which Duncan improperly removed funds, the improprieties could not have occurred without immediate detection.

Verrill Dana practices in 2006 and 2007 for supervising and training attorneys and encouraging attorneys to keep current with ethical requirements and developments in the law were consistent with common practice in the Maine legal community for law firms having significant numbers of partners and associates.

In late 2006, a Verrill Dana paralegal, reviewing a bank statement, noted a discrepancy between the check register for an account managed by Duncan for Janice Thomas and the bank statement of that account. The check register indicated a payment to Verrill Dana. The bank statement, with a copy of the face of the check appearing on the back, indicated a payment to Duncan.

This paralegal had been filling in for Ellie Rommel, the regular secretary for Duncan in the private clients group. Rommel also was the secretary to another attorney working in the private clients group, Gregory L. Foster. Foster was a counsel to the firm and usually worked in the office two days each week. Rommel had a very good professional relationship with, and high respect for, both Duncan and Foster.

In January 2007, the paralegal told Rommel of the discrepancy she had discovered between the check register and the bank statement. Rommel was extremely surprised by this disclosure. She assumed, initially, that the discrepancy would be based on an error in entry and not indicative of any impropriety. She then checked banks statements against the check registers going back to 2003. Over that period, she discovered fourteen checks that Duncan, using his power of attorney authority, had written to himself from the Janice Thomas account. The check registers indicated that each of these checks had been written to Verrill Dana. The faces of the checks were reproduced on the bank statements. Therefore, confirming the party to whom the check was written, and comparing it with the check register, was a relatively simple process.

Rommel was shocked and greatly disturbed by this discovery. To her, it appeared that Duncan had been embezzling funds from the Janice Thomas account. However, considering Duncan's impeccable reputation in the firm, and his very good professional relationship with her, Rommel hoped that there would be some legal and proper explanation for these discrepancies. She was unsure, however, to whom she should disclose her discoveries, to seek an explanation.

She decided that she did not want to seek an explanation directly from Duncan because the facts, in her mind, looked like he had committed crimes. Duncan had been having some other health issues at the time, and Rommel was

concerned that if she was correct that these facts indicated embezzlement, and they were disclosed, Duncan might be driven to suicide, a tragic event in itself, and one that would have tragic consequences for Duncan's family and the firm.

Knowing these facts, and having no one to discuss them with, was a cause of considerable anxiety and stress for Rommel, making it more difficult to confidently do her job and live her life. These difficulties were enhanced when she observed that Duncan was viewing pornographic materials on his computer, sending and receiving e-mails with a sexual content, in violation of firm policy, and engaging in an affair out of the office with another individual at times when Rommel was aware that Duncan was billing some clients for time spent on their accounts.

Over several months, Rommel's stress level and anxiety grew as she knew, but did not disclose, this information. In May, Rommel resolved to leave the firm and gave notice that her last day would be June 15, 2007.

Rommel also began seeing a therapist. The therapist advised Rommel that she needed to disclose the information to someone for her own good and peace of mind and for the good of the firm.

Ultimately, in early June 2007, Rommel disclosed what she knew to Greg Foster. She made the disclosure by meeting with Foster, advising him that she believed that Duncan was improperly writing checks to himself from the Janice

Thomas account, and giving Foster a file of the materials that she had gathered comparing the bank statements and the check registers. She stated that she believed that Duncan was embezzling money from the client.

Like Rommel, Foster was extremely surprised by the disclosure and, in light of Duncan's impeccable reputation within firm and in the community, assumed that there would be a rational and proper explanation for the information that he had received regarding the Thomas account.

Foster promptly reported the disclosures about the Thomas account and the supporting documentation to David Warren.

Warren was the managing partner of Verrill Dana and had been so since 1994. Warren was admitted to the Bar in 1979. He had joined the firm from another firm as a partner in 1989 and had known Duncan since joining the firm. Warren had attended the same college as Duncan, but knew Duncan, who was a year or two ahead of Warren, only slightly in college. Although Duncan and Warren worked in different groups at the firm, they had worked together on some matters of firm-wide interest, particularly when Duncan had chaired the executive committee and the compensation committee and chaired the private clients group. Warren and Duncan did not have a social relationship outside the firm.

Like Rommel and Foster, Warren was shocked by the information and, in light of Duncan's impeccable reputation and long time with the firm, assumed that

there must be some rational explanation, most likely that Duncan, while writing checks to himself, had then transferred the money to the firm as required by the partnership agreement.

Warren promptly initiated further inquiries to obtain from the bank copies of the backs of the checks in question, which would include the endorsements on the checks and the accounts that the checks were paid into. Warren also obtained the most recent annual spreadsheet for the account, showing activity in the account in 2006.

Upon obtaining this information, Warren learned that the endorsements on the checks transferred funds to an account at the same bank that was not a Verrill Dana account. Warren also learned that a total of $77,500 had been paid from the account to Duncan between 2003 and 2007.

At the time, Warren knew that there were a few accounts managed by Verrill Dana from which attorneys had authority to write checks to themselves that were not turned over to the firm, and he knew that such authority might attach to certain conservator accounts. However, he was not aware that Duncan had any authority to write checks to himself, not to be turned over to Verrill Dana, from the accounts that Duncan managed.

Following this investigation, Warren met with Rommel on June 13, 2007. At this meeting, he thanked her for providing this information and indicated that he

would be addressing the matter appropriately with Duncan. Rommel testified that Warren complimented her, stating that her actions "took a lot of courage." They also discussed Rommel's status with the firm, whether Rommel might qualify for disability payments, and whether she should rescind her resignation. There are differences in the testimony regarding the extent to which the issues of disability payments and rescinding the resignation were of significance in the discussion. However, as the parties recognized at closing argument, these differences are not material to the issues the Court must resolve.

The outcome of the June 13 meeting was that Rommel's resignation was not rescinded, there was a commitment to explore the issue of whether disability payments would be pursued further, and because of her emotional state, Rommel was excused from having to appear at the firm for her last two scheduled days of work. Warren also advised Rommel that, although she was leaving the firm, he would keep her apprised of developments relating to Duncan.

That day or the next, Warren advised James Kilbreth, the chair of the firm's executive committee, of what he had learned. Like Foster and Warren, Kilbreth was very surprised when he heard of Duncan's apparent diversion of firm funds.

After his discussion with Kilbreth, Warren resolved to confront Duncan regarding the information that he had. During the next two weeks, Warren was out of the office a considerable period of time, principally for work in Boston relating

to opening a Boston office. Duncan was also out of the office some of the time. Warren did not want to schedule a meeting in advance, but instead wanted to drop in on Duncan spontaneously when both were in the office.

That occurred early in the morning of June 28, 2007. At that meeting, after exchanging pleasantries, Warren asked Duncan, "John, tell me about Janice Thomas?" Duncan responded that Thomas was a long-term client and friend. After a pause, Duncan responded further, stating, "I'll pay it all back." In response to other questions by Warren, Duncan indicated that: (1) the funds at issue, $77,500, were the only funds he had misapplied; (2) no other account he managed had been subject to any improprieties; and (3) the funds represented fees, in an appropriate amount, that had been legitimately earned for work Duncan had done on the account but which should have been paid over to the firm to comply with the partnership agreement.

Duncan offered to write the firm a check right then to cover the funds that should have been paid over to Verrill Dana. Duncan appeared to Warren to be "extremely forthcoming" in discussing the Thomas account. During the conversation, Duncan became very upset and repeatedly expressed what Warren believed to be sincere remorse for the misapplication of partnership funds. Duncan offered to resign from the firm.

Based on this conversation, Warren reasonably believed Duncan's statements and his expressions of remorse, indicated above. Particularly, he believed that no other accounts were involved, and that the fees paid to Duncan from the Thomas account represented fees earned for legal services, which should have been, but were not, paid over to Verrill Dana, thereby violating the partnership agreement. Warren did not view Duncan's actions as a theft of firm funds, but only a violation of the pay-over obligation of the partnership agreement.

Warren acted reasonably in believing Duncan because of his, until then, impeccable reputation for honesty, his exemplary performance over thirty years with the firm, his stellar record in the community, and his immediate and apparently sincere expressions of remorse and contrition. The reasonableness of Warren's belief was also supported by his knowledge of the 2006 spreadsheet by which the funds that should have been paid over were easily identified.

Based on these representations and his belief in the truth of Duncan's statements, Warren advised Duncan that he should defer decision on the offer to resign. Warren also advised Duncan to defer repayment until Warren could confirm the amount that was due.

Warren advised Foster that he had met with Duncan soon after the meeting ended. Later that day, in response to an e-mail from Foster asking if his or

Rommel's name had come up in Warren's conversation with Duncan, Warren e-mailed Foster:

> Yes, I obviously had to relate the source of my inquiry, which I described as Ellie to Greg to me. I did not (and cannot) describe it as Ellie overreacting to a misunderstanding; she did the right thing, albeit difficult to do. As did you when you called it to my attention; and as (I think) did I this morning.
> [Let's] talk by phone. In the meantime, it would not be helpful for you to talk with John about this.

After Warren confirmed the amount that was due, Duncan repaid the firm by a bank check provided to Warren on July 2, 2007.

Warren advised Kilbreth of the conversation with Duncan on June 28, 2007. Based on Warren's report of Duncan's statements, his apparent heartfelt remorse, and his prior impeccable reputation within the firm and in the community, Kilbreth agreed with Warren's assessment that this was an isolated, aberrant incident, that it would not recur, that no clients had been harmed, and that Duncan should not be required to resign or be subject to other corrective or disciplinary action.

The executive committee was advised of Duncan's misapplication of funds in the Janice Thomas account on July 9, 2007. The executive committee then consisted of James Kilbreth as chair and Eric Altholz, Mark Googins, Roger Clement, and Juliet Browne as members.

There was an extended discussion of the matter in the executive committee, with members expressing considerable surprise similar to that felt earlier by

Warren, Foster, and Kilbreth because of Duncan's prior reputation for trustworthiness and honesty. One member of the executive committee asked, "Was he stealing from the firm?" There was no discussion of whether the matter might be reported to the Board of Overseers of the Bar. The executive committee accepted the view that only funds earned by the firm had been involved; failure to pay over the funds was a violation of the partnership agreement but not a theft; client funds had not been taken; and the funds at issue had been repaid in full to the firm.

The executive committee members shared the view of Warren and Kilbreth that this was an aberrant event by an otherwise honest and trustworthy individual that had not spread wider than this single account and would not be repeated.

The executive committee also agreed with Warren and Kilbreth's assessment that Duncan's offer to resign should not be accepted and that he should be continued with the firm. As a result of the meeting, it was agreed that Warren would contact Kurt Klebe, then head of the private clients group, and advise Klebe of these matters so that he was aware of events occurring within his group and could implement practices to prevent such events recurring in the future.

During this period, Warren and Foster had been engaging in e-mails with Rommel in which Rommel wondered about further developments based on her reports and expressed some frustration at not having been kept advised of events.

On July 13, 2007, Warren and Rommel spoke by phone. In this conversation, Rommel expressed some frustration that the firm had not, to date, been more aggressive in dealing with Duncan because of her perception that his actions were theft and posed risks to firm clients. Warren indicated his confidence that the incident had been an aberrant and isolated one that was unlikely to be repeated, that the firm had been made whole, and that no clients had been or would be harmed. Rommel seemed "relieved" when advised that Duncan had not been converting client funds. Warren invited Rommel to return to the firm in a different position not working with Duncan. Rommel said that she would think about it and respond later.

On July 18, 2007, Rommel e-mailed Foster regarding Warren's invitation to return to the firm stating:

> Well, I'm not going to make any decisions yet, I have to determine if I can cope with returning, but we'll talk about it again. I have to think it over and decide if I want #1 to face commuting again #2 the price of gas now, etc. But thanks to both you and Mr. Warren.

On July 17, 2007, Warren and Foster met with two other paralegals who were aware of some of the issues regarding Duncan's misuse of funds. The purpose of this meeting was to inform these individuals of the firm's investigation and actions regarding Duncan. One of the paralegals was the individual who had originally discovered the discrepancy in the Thomas account and reported it to

Rommel. During the meeting, one of the paralegals advised that there might be another account with a discrepancy involving a check to Duncan for $5000 that may not have been paid over to Verrill Dana for fees earned for work on the account.

Following the meeting, Warren asked Foster to check out the information regarding the other account, recognizing that discovery of another account with a misapplication of funds would be a serious event. Foster then went back to the paralegal, asked for more information, was not able to receive any more information, and advised Warren that he, Foster, had checked out the report further and that there was nothing to the suggestion of a misapplication of funds by Duncan in another account. Based on Foster's investigation and report, Warren did not pursue that matter further.

After the July 9, 2007, meeting, Kilbreth and Warren had spoken, or had attempted to speak, with Duncan further about the incident. Duncan's reactions to their attempts to discuss the matter were very emotional and very remorseful. He seemed significantly concerned when made aware that others, specifically the executive committee, had been made aware of his problems. Duncan was having additional health and emotional stresses at the time, because he was being treated for a bleeding ulcer, and his father was near death and ultimately died.

Warren was concerned that Duncan was a serious suicide risk because of his despondency and emotional fragility. Warren was aware of another situation at a law firm when a member of the firm, confronted with information suggesting an embezzlement, had committed suicide. Further, during this time, there was widespread knowledge of a June 2005 suicide of a sole practitioner who had converted significant sums from client trust accounts to personal use. *See In re Faulkner*, Bar-05-02. The Court file in the *Faulkner* matter[3] indicates that several Portland law firms, although apparently not Verrill Dana, had been involved in litigation regarding attempts to recover for their clients a share of funds that had been identified as remaining in client trust accounts.

Because of his concern regarding a possible suicide risk, Warren elected not to advise Klebe of Duncan's situation. Warren believed that such disclosure would necessarily have to be followed up by a Klebe contact with Duncan, which could drive Duncan "over the edge." For that reason, although the matter was discussed from time to time at executive committee meetings over the course of the summer, Warren did not advise Klebe of the situation, and the executive committee acquiesced in Warren's deferring action on that matter. They believed, as did Warren, that the incident was isolated and resolved with repayment of the funds

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[3] The Court can take judicial notice of its own files. M.R. Evid. 201(b); *Finn v. Lipman*, 526 A.2d 1380, 1381 (Me. 1987).

and that, therefore, a deferral of Klebe's involvement worked no prejudice to either the firm or its clients.

This remained essentially the status of things through the summer of 2007.

On August 16, 2007, Rommel and Warren met to discuss various issues of mutual concern. As originally had been suggested by Greg Foster, Warren gave Rommel a check representing an additional four-weeks' pay to reflect appreciation for her work leading to the disclosure and the stress that the disclosure process had caused her. They also discussed the possibility of Rommel's returning to the firm, with Warren indicating that Verrill Dana could find a position for her that would involve no professional relationship with Duncan and only limited, incidental contact. Rommel also reported to Warren information that Warren had already learned regarding Duncan's affair and use of his computer for sexually-explicit materials and e-mails.

The testimony differs relating to the extent to which Rommel was critical of the firm for failing to discharge Duncan and further investigate accounts that he managed in the interest of protecting clients. However, as the parties agreed at oral argument, these differences regarding emphasis and vigor of the conversation are not material to the issues this Court must decide. At the August 16, 2007, meeting, no new information was provided regarding any improprieties by Duncan. Rommel declined the invitation to return to Verrill Dana.

In September 2007, following Duncan's father's funeral and Duncan's several weeks away from the office, Warren believed that Duncan was getting his emotions under control and was in a position to have Klebe, and perhaps others, discuss the situation and his accounts with him. The executive committee also requested, again, that Warren advise Klebe of the situation and suggest that he review procedures in the private clients group to ensure that there were no further problems with Duncan's accounts and that what had occurred in the Janice Thomas account could not happen again.

On October 2, 2007, Warren advised Klebe of the situation with the Janice Thomas account and asked that Klebe review the account and procedures for protection of client funds in the private clients group. Like others before him, upon learning of the situation, Klebe was very surprised considering Duncan's prior reputation with the firm. Klebe then began an investigation of processes and accounts managed by Duncan.

By October 5, 2007, Klebe had discovered and reported to Warren that there was a problem in an additional account with a $5000 check written by Duncan to himself for fees reportedly earned by the firm that were not paid over to the firm. A broader investigation then revealed several other accounts with similar problems of Duncan writing and keeping for himself checks that apparently should have been paid over to the firm as fees for services earned by the firm.

On October 10, 2007, Verrill Dana received from Rommel's counsel, Daniel Lilley, a "preservation" letter, advising that Rommel was considering an employment action, requesting that attorneys at Verrill Dana have no direct contact with Rommel, and asking that any evidence of the Duncan transactions and Rommel's actions be preserved. Ultimately, Rommel, through counsel, filed a grievance complaint with the Board in late December 2007, and a complaint with the Maine Human Rights Commission in January 2008. The complaint to the Board reported Duncan's misappropriation of funds and Rommel's perception of an insufficient reporting and response to Duncan's actions. The Maine Human Rights Commission complaint addressed issues regarding Rommel's leaving the firm that, with the evidence now completed, the parties agree are not material to the alleged ethical violations to be addressed in this case.

With this information in hand, several other individuals, including the firm's general counsel, were advised of the problem. By this time, mid-October, it was apparent that Duncan had lied to Warren and that Warren's trust in Duncan had been misplaced when Duncan had told Warren, on June 28, 2007, that only one account was involved in his practice of keeping for himself fees that should have been paid over to the firm.

The executive committee met on October 27, 2007, and decided to terminate Duncan. Warren and Kilbreth met with Duncan on October 28, 2007, and agreed that his partnership would be terminated effective December 31, 2007.

Early the next week, the results of a substantial independent audit that had been ordered disclosed that not only had Duncan failed to pay over funds for legal services that should have been paid to the firm, but also that he had directly taken client money in situations where no legal services, or no legal services of significance, had been performed on accounts from which client funds were paid by Duncan to himself. It was apparent to all that these actions were thefts of client funds.

At this point, Duncan was terminated immediately from the firm and the firm notified the Board of Overseers of the Bar, the U.S. Attorney, and the Cumberland County District Attorney of Duncan's thefts and other improprieties. With this notice, the Board began its investigation, ultimately leading to the filing of the Information that led to this proceeding.

In 2008, Duncan was charged and pleaded guilty to felony theft in the Superior Court and income tax evasion in the United States District Court. He paid a substantial amount of restitution and received a prison sentence of approximately two years. He was also disbarred.

Verrill Dana has restored the funds that were taken by Duncan to all client accounts affected by the thefts.

Because of Duncan's thirty-year history with the firm, his previous impeccable reputation for honesty and trustworthiness, his leadership in important matters both in the firm and in his community, and his immediate and apparently sincere expressions of regret and remorse when confronted with questions about his handling of the Janice Thomas account, Warren, Kilbreth, and the executive committee acted reasonably in believing that Duncan's dealings in the Janice Thomas account were an aberrational incident, that no other accounts were affected, that only firm funds and not client funds were involved, and that with Duncan's repayment, the firm had been made whole for its losses.

With this background of understanding, Warren, Kilbreth, and the executive committee could and did reasonably believe that, while the partnership agreement was violated by Duncan's failure to pay over funds earned for legal services, a theft had not been committed based on the facts as Warren, Kilbreth, and the executive committee believed those facts to be.

Warren and Kilbreth, having observed Duncan's emotional state, and his reactions to discussions or attempts to discuss the events relating to the Janice Thomas account, had a reasonable basis to be concerned that further follow-up and investigation and involvement of additional persons in examination of Duncan's

performance could lead to a suicide. A similar reasonable belief had caused Rommel to delay for six months in reporting her concerns to anyone else in the firm.

The combination of the concerns about a potential suicide and the belief that Duncan's actions regarding the Janice Thomas account were a single incident involving losses only to the firm, that those losses had been recovered, and that there were no further concerns regarding impropriety affecting the firm or clients, made the decision to delay involving Kurt Klebe a decision that was not demonstrably unreasonable. Notably, there were no further improprieties and no harm to the firm or clients occurring within the three-month period from the July 9, 2007, executive committee meeting to October 2, 2007, when Kurt Klebe was advised of the matter and began his investigation which led, almost immediately, to the discovery of other improprieties.

V. CONCLUSIONS

Based on the evidence and arguments presented, and the findings stated above, the Court reaches the following conclusions that govern its determinations of the Board's allegations of violation of the specific Bar Rules discussed below:

1. Based on the facts as they knew or believed them to be at the time, Warren, Kilbreth, and the executive committee acted reasonably in concluding that Duncan's transactions in the Thomas account were an isolated, aberrational event;

that no other accounts were or would be affected; that retaining checks that Duncan had authority to write and not paying them over to the firm was a violation of the partnership agreement, but was not theft; and that the firm had been made whole for the funds it was due for legal services rendered. As paragraph 19 of the Preamble to the Maine Rules of Professional Conduct notes:

> The Rules presuppose disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact a lawyer often has to act upon uncertain or incomplete evidence of the situation.

This disciplinary action against the respondents must be determined based on what they knew or believed at the time, when their actions were based on the uncertain evidence of the situation created by Duncan's lies.

2. Further investigation revealed that Duncan's actions were theft from clients and from the firm. When recognized as theft in October and November 2007, Duncan's actions should have been and were promptly reported to the Board. Before that time, the respondents reasonably believed that Duncan's actions were not theft because he was authorized to write and retain the checks at least for some period of time, and the remedy to recover the proceeds of the checks would be a civil complaint not a criminal charge. *See State v. Nelson*, 1998 ME 183, ¶¶ 6-8, 714 A.2d 832, 833-34. No civil action was necessary in this case

because, when confronted, Duncan promptly paid over the funds then believed to have been retained in violation of the partnership agreement.

3. The Board contends that the respondents were required to make "an immediate report to the Board of Overseers" in late June or early July when they first learned of Duncan's actions. Such an "immediate report" on first notice, without more consideration and development of information to support a belief that a significant ethical violation had occurred, could have created a risk of an employment action that the firm would have had to defend. *See Kamaka v. Goodsill, Anderson, Quinn & Stifel*, No. 26308, 2008 Haw. LEXIS 33 (Haw. Feb. 14, 2008) (stating that law firm successfully defended, through jury trial and appeal, terminated attorney's claims for discrimination and tortious interference with expectancy referencing careful investigation and documentation of billing and paperwork improprieties).

The firm might also have faced a defamation claim if an "immediate report" was not sufficiently investigated or supported. *See Morgan v. Kooistra*, 2008 ME 26, ¶¶ 26-28, 941 A.2d 447, 455. A report to a professional disciplinary body or a prosecutor would have been conditionally privileged, *see Rice v. Alley*, 2002 ME 43, ¶¶ 21-24, 791 A.2d 932, 936-37; *Packard v. Central Maine Power*, 477 A.2d 264 (Me. 1994), but an action could have been maintained if the report was alleged

to be based on truthful but incomplete or misleading information. *See Marston v. Newavom*, 629 A.2d 587, 589 (Me. 1993).

Thus, some delay in reporting to allow further investigation and understanding of the circumstances—the type of investigation suggested by the executive committee, though not in relation to reporting to the Board—would have been prudent. An "immediate report" without more consideration, may not have been prudent.

4. With Duncan's thirty-year record of exemplary service to the firm and the community, and his, until then, impeccable record for ethics and honesty, the respondents were not unreasonable in their decision to decline to accept Duncan's proffered resignation and to allow him to remain with the firm based on what the respondents knew or believed at the time. While Duncan could have been expelled from the firm at the time, Maine practice and rules of ethics, then or now, did not require expulsion from a firm upon discovery of misapplication of funds in a single account, after an otherwise exemplary thirty-year record of professional accomplishment and, it appeared, ethical propriety.

5. Some delay in addressing further investigation and remedial action with Duncan was appropriate based on Duncan's then-perceived precarious emotional and health status and the good faith belief by Rommel, Warren, and Kilbreth that pursuit of such matters with Duncan could push him "over the edge" to suicide.

The respondents did not take lightly their concern about a possible suicide, and the delay in further address of this matter until that concern was reduced, was humane, and was not an ethical violation. Notably, during the period from Warren's confrontation with Duncan on June 28, 2007, to the direction to Klebe to investigate further on October 2, 2007, there was no further misapplication of client funds or firm funds.

Based on its findings and general conclusions, the Court addresses the allegations in the Information that the following provisions of the Code of Professional Responsibility were violated by one or more of the attorneys who are subject to the Information as follows:

1. The Board has failed to prove, by a preponderance of the evidence, any violation Bar Rule 3.1(a). For the reasons stated above, no violation of the Code of Professional Responsibility is proved and no other act is proved that the Court finds to constitute conduct "unworthy of an attorney" pursuant to 4 M.R.S. § 851.

2. The Board has failed to prove, by a preponderance of the evidence, any violation of Bar Rule 3.2(e)(1). Based on what the respondents knew or believed at the time, on facts now known to be incomplete, the respondents did not believe that the perceived-to-be aberrational misapplication of firm funds from one account required a report to the Board or the prosecutor as an action that, in light of

Duncan's thirty-year history, raised "a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer." The Court also notes that ultimately, Duncan's actions were reported to the Board and the prosecutor. The only real issue is whether, in light of all the circumstances discussed above, the Board has proved that the four-month delay from discovery to first report was unreasonable. The delay is not proved to be unreasonable on the facts of this case.

3. The Board has failed to prove, by a preponderance of the evidence, any violations of Bar Rule 3.2(f)(2), (3), and (4) requiring that a lawyer not engage in "illegal conduct" "that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer;" or engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or engage in conduct "prejudicial to the administration of justice." Certainly Duncan violated all of these Rules and many more, but no rule of guilt by association applies. *See Matter of Phillips*, No. SB-10-0036-D, 2010 Ariz. LEXIS 52, at *13-14 (Ariz. Dec. 16, 2010) (stating that the "rules imposing managerial and supervisory obligations . . . do not provide for vicarious liability for a subordinate's acts; rather they 'mandate an independent duty of supervision'" and holding that attorney head of large firm violated ethical rules when he had obligation of direct supervision of subordinate attorneys and non-lawyer staff and failed to provide the required supervision).

None of the respondents before this Court have been proved to have engaged in illegal conduct, or conduct involving dishonesty, fraud, deceit, or misrepresentation. No prejudice to the administration of justice has been proved. Had an earlier report and intervention resulted in the tragedy of a suicide, something the respondents legitimately feared, identification of injured clients and restitution to clients and the firm might have been delayed or foreclosed. That would have prejudiced the administration of justice.

4. The Board has failed to prove, by a preponderance of the evidence, any violations of Bar Rule 3.13(a)(1), (2), and (3). The identified paragraphs of Rule 3.13(a) require partners in a law firm to make "reasonable efforts" to ensure that the firm has in effect measures giving "reasonable assurance" that all lawyers in the firm conform to the Code of Professional Responsibility and requiring that lawyers having "direct supervisory authority" over other lawyers shall "make reasonable efforts" to ensure that the other lawyers conform to the Code of Professional Responsibility. Among experienced lawyers in a firm, informal supervision and periodic review is sufficient to meet these ethical standards. *See Attorney Grievance Comm'n of Md. v. Kimmel*, 955 A.2d 269, 285-86 (Md. 2008) (contrasting limited obligation to supervise experienced attorneys with substantial obligation to supervise inexperienced attorney in separate office of large firm).

The Board has failed to prove that any of the respondents deviated from what the evidence indicated was common law firm practice at the time to promote continuing legal education and other informal measures to give reasonable assurance that members of the firm conform to Bar Rule 3. The Board has not proved that, in Verrill Dana firm management, (1) any respondent had direct supervisory authority over any lawyer whose conduct is at issue in this case; (2) any respondent ordered, or with knowledge of specific misconduct, ratified the conduct at issue; or (3) any respondent knew of conduct at a time when its consequences could have been avoided or mitigated, but failed to take reasonable, remedial action. The Board asserts that, believing what they did about Duncan's conduct, the respondents, or some of them, violated Rule 3.13(a) by enabling or failing to mitigate Duncan's misconduct by allowing him to remain with the firm and delaying in reporting his misconduct to the Board. After Duncan's misconduct was discovered by firm management in June of 2007, no further misconduct occurred that could have been enabled or mitigated.

VI. SUMMARY CONCLUSION

John Duncan's betrayal of trust was a tragedy for his clients, his family, his firm, and the larger community in which he was a respected participant. His betrayal of trust may have damaged the underlying premises of law firm governance, reliant on mutual trust, respect, and obligation of law firm partners

toward each other, and a shared commitment to the greater good of clients, the firm, and the community at large. The respondents observed Duncan's misconduct, and applying the trust built up over thirty years and the mutual commitment of partnership, invited him to remain with the firm. They delayed further investigation and report of his actions based on humane consideration of a fellow partner's difficult emotional situation. When the true extent of Duncan's misconduct was revealed, they promptly reported it and proceeded to make betrayed clients whole. With the clarity of hindsight, the respondents were perhaps too trusting when they had good reason to trust, but they committed no violations of the Code of Professional Responsibility.

The entry is:

> Judgment for the Respondents that the violations of the Code of Professional Responsibility alleged in the Information have not been proved by a preponderance of the evidence.

Dated: December 29, 2010

FOR THE COURT,

/s/

Donald G. Alexander
Associate Justice