

STATE OF MAINE
Kennebec, ss

Board of Overseers of the Bar
Grievance Commission
File No. 02-105

BOARD OF OVERSEERS OF THE BAR,

Petitioner

v.

AMY B. McGARRY

Respondent

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DECISION

This matter came before Panel E of the Grievance Commission on the November 1, 2002, petition of Bar Counsel alleging numerous violations of the Maine Bar Rules against the Respondent Amy B. McGarry of Wells in connection with her representation of Frank Woodard. A public hearing was conducted on March 4, 2003 to determine whether a bar rule violation had occurred and whether probable cause exists for filing an information pursuant to Maine Bar Rule 7.2(b).

The Board was represented by J. Scott Davis, Esq. Respondent, McGarry, was represented by James Bowie, Esq. No objection was made to the composition of the panel. At the hearing, the Panel admitted Board exhibits 1 – 26, without objection. The Panel heard testimony of the Respondent attorney as well as that of Mr. Woodard and of James Molleur, Esq. On the basis of the largely uncontroverted evidence, this panel finds that the Maine Bar Rules have been violated. For the reasons stated herein, the panel reprimands Attorney McGarry for her violation of Bar Rules 3.2(f)(3) and 3.7 (e)(1)(i).

FACTS

In August of 2001, Frank Woodard was divorced in the Maine District Court from Joyce Bradway-Woodard (hereafter “Bradway”). The marital property included an Oldsmobile Alero which secured a joint obligation of Mr. Woodard and Ms. Bradway. The Divorce Decree set aside to Bradway the automobile and imposed upon her the sole obligation to pay the claim secured by that motor vehicle. Mr. Woodard, nevertheless, remained obligated to the creditor who financed the automobile. On January 9, 2002 Bradway commenced a chapter 7 bankruptcy case in New Hampshire, exposing Mr. Woodard to an obligation to pay for an automobile he no longer owned. The January 18, notice of the bankruptcy case received by Mr. Woodard contained a notice to all creditors that the deadline for filing complaints to determine the dischargeability of claims was April 12, 2002.

Mr. Woodard, in early March, contacted the law firm of Nadeau and McGarry. Following a telephone conversation wherein Mr. Woodard notified the attorneys of the April 12 deadline, the firm accepted employment by Woodard. In its fee agreement, the firm undertook to represent Woodard in “post-divorce matters”.

Mr. Woodard authorized the firm to take action in both the Maine divorce court and the New Hampshire bankruptcy court to enforce his claim of indemnity against Bradway. Other members of the firm filed a motion for contempt on April 9, 2002. The Maine District Court on April 12, 2002, deferred action on the contempt motion pending a determination by the bankruptcy court. Meanwhile, Ms McGarry, licensed to practice in New Hampshire, had filed a motion in the New Hampshire bankruptcy case on April 10, 2002, seeking bankruptcy court permission to proceed in the Maine District Court to enforce what she characterized in the motion as a marital obligation. (Board Ex. 19). However, the deadline passed without the filing of a complaint to have the claim in question excepted from the bankruptcy discharge. Following the expiration of the deadline, another attorney associated with firm, in the course of research in an unrelated matter, discovered that the New Hampshire bankruptcy judge had authored a decision potentially favorable to an argument by Woodard that the right to be indemnified from liability on the car loan should be regarded as non-dischargeable under Bankruptcy Code §523(a)(15). In consultation with other members of the firm, Ms. McGarry on April 23, 2002, filed a complaint seeking to except Mr. Woodard's claim from Ms. Bradway's bankruptcy discharge despite the fact that the deadline for filing such a complaint under Bankruptcy Code Section 523 (a)(15) had passed.

In her April 23, 2002 cover letter addressed to the Bankruptcy Clerk, (Board Exhibit 8) Ms. McGarry represented that the failure on the part of the firm to file a timely complaint was due to "an administrative oversight which led to the omission of the complaint at the same time the motion for relief from stay was filed". It is uncontroverted that the complaint was neither in existence, nor in Ms. McGarry's contemplation, when the motion for relief from stay was filed. A hearing in bankruptcy court was conducted on May 14, when Ms. McGarry repeated her explanation.. The motion for relief from stay was denied. According to Ms. McGarry, the New Hampshire Bankruptcy Court denied the motion because it found that Ms. Bradway did not have the requisite financial ability to pay the automobile loan critical to a determination of non-dischargeability.

ALLEGATIONS OF MISCONDUCT

Ms. McGarry is alleged to have violated the Maine Bar Rules for failure to file a timely complaint contesting the dischargeability of Woodard's claim. She is also alleged to have misrepresented the reasons for the late filing to her client and to the Bankruptcy Court.

DISCUSSION

The explanations offered by Ms. McGarry with respect to her legal strategies in this case occasionally lacked clarity. The confusion may be attributable to the nuances of bankruptcy law and the discrepancies between Mr. Woodard's expectation that the April 12 deadline would be met and the fact that the Respondent never expressly undertook to file any pleading in the bankruptcy court other than a motion for relief from stay. Various aspects of her testimony, however, lacked transparency. The panel also notes that in the course of her explanations to her client with respect to the outcome of the May 14 hearing, and later in her response to Bar Counsel, she demonstrated an inclination to deflect blame for the lateness of the complaint upon

others, including Mr. Woodward himself. Her testimony does persuade the panel that the failure of her firm to file a timely complaint was attributable to a rational analysis of the likelihood of success and not due to neglect. Furthermore, it is apparent that no adverse consequences flow from the late filing given the court's disposition of the motion for relief from stay based upon the merits of the challenge. However, the representations made by Ms. McGarry with respect to the reasons for the late filing must be evaluated apart from her legal analysis. Her explanation as to why the complaint was not filed with the motion for relief from stay was false. Despite her insistence that she did not intend to mislead, she fabricated a reason which, in some circumstances, might have excused the lateness. That fabrication was repeated in open court. Her false statements violated the general admonition of Maine Bar Rule 3.2 prohibiting misleading conduct by lawyers and the specifics of M.B.R. 3.7(e)(1)(i) requiring litigators to employ only "such means as are consistent with truth".

DETERMINATION

Maine Bar Rule 7.1 provides that if the Panel finds that misconduct subject to sanctions under these rules has occurred, the Panel may either dismiss the petition with a warning, issue a public reprimand, or direct Bar Counsel to commence an attorney discipline action. Dismissal with a warning is appropriate when the Panel concludes that the violation is minor, that there is little or no injury to a client, the public, the legal system or the profession, and that there is little likelihood of repetition by the attorney.

The panel is convinced of Ms. McGarry's diligence, her devotion to her clients and her fundamental good faith. Yet, it is unwilling to dismiss a deliberate fabrication as minor or harmless to the legal system or the profession. Accordingly, this Panel issues the foregoing reprimand of Ann B. McGarry.

Dated: April _____, 2003

Stephen G. Morrell, Chair Panel E

Harriet Tobin

Charles W. Smith, Jr.