

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. BAR-04-11

BOARD OF OVERSEERS OF THE BAR)

Plaintiff)

v.)

CHRISTOPHER J. WHALLEY)

Respondent)

DECISION AND ORDER

This matter is before the Court pursuant to M. Bar R. 7.2(b)(1) and (2) on an information filed by the Board of Overseers of the Bar against Christopher J. Whalley, Esq. The Board alleges that Whalley violated provisions of the Maine Bar Rules regarding his duties to former clients and a disclosure of confidential information. Assistant Bar Counsel Geoffrey S. Welsh, Esq., initially represented the Board; he has since been replaced in this matter by Bar Counsel J. Scott Davis. Rosemarie Giosa, Esq., represents Whalley.

In July 2002, the Ellsworth District Court appointed Whalley to represent a mother who was facing a child protective proceeding instituted by the Department of Human Services. In the course of this representation, Whalley obtained information about certain conduct of the mother, including allegations of substance abuse. The mother left the State for a while after the case commenced, and the children eventually were permanently placed with their biological father. After

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advising her of what she could do if she desired to obtain custody of the children in the future, Whalley closed his case file on the matter by February 2003.

In August 2002, Whalley commenced representation of Jessica Huck. Huck sought Whalley's help because she believed her ex-husband was not complying with the terms of their divorce judgment. At the time Whalley commenced representing Huck, he had no reason to know of any potential conflict of interest.

In July of 2003, while the post-divorce matters were still pending, Huck became concerned about her ex-husband's girlfriend having contact with her child during visitation. After speaking by telephone with one of Whalley's assistants, Huck and her current husband obtained a temporary protection order to prevent her ex-husband from allowing his girlfriend to have contact with Huck's child. After obtaining the temporary order, Huck visited Whalley to further discuss this matter. During this visit, Whalley was informed for the first time that the ex-husband's girlfriend was, in fact, the former client Whalley represented in the DHS proceeding.

Whalley advised the Hucks that he could only handle the matter if it did not proceed to a hearing. Whalley told the Hucks that he could not cross-examine his former client, but if the matter could be settled without an adversarial proceeding, he could handle the matter. Whalley stated that he knew the attorney representing Huck's ex-husband, and that he was optimistic that the matter could be settled with

a consent order. Whalley neither sought nor obtained the permission of his former client to represent the Hucks in this matter. The Hucks eventually did negotiate a consent order that was accepted by the court without a contested hearing on August 4, 2003. The permanent protective order entered that day provided that there would be no contact between Huck's child and Whalley's former client.

On October 14, 2003, Whalley wrote a letter to the counsel for Huck's ex-husband. The letter indicated the Huck had recently learned that her ex-husband planned to marry Whalley's former client, who was now pregnant. In his letter, Whalley disclosed that he was involved in the former client's DHS matter, and that he expected that DHS would not allow the woman to keep an infant child. Whalley informed the attorney for Huck's ex-husband that Huck was suspending his visitation with their child until arrangement could be made to ensure that the child would not come into contact with Whalley's former client. Again, it appears the parties ultimately settled this matter on terms similar to those agreed to in the August 4 consent order.

Whalley's former client filed a complaint with the Board of Overseers of the Bar, alleging that the letter sent by Whalley to the attorney for Huck's ex-husband violated her expectation of confidentiality and revealed a conflict of interest. Although bar counsel recommended that the matter be dismissed, the Grievance Commission found probable cause to believe Whalley engaged in misconduct.

This proceeding followed, during which the parties submitted a number of exhibits, the live testimony of several witnesses, and written closing arguments.

The Board first charges that Whalley violated M. Bar. R. 3.4(d)(1), which provides in relevant part:

[A] lawyer shall not commence representation adverse to a former client without that client's informed written consent if such new representation is substantially related to the subject matter of the former representation or may involve the use of confidential information obtained through such former representation.

M. Bar. R. 3.4(d)(1). Although Whalley suggests that his representation was not adverse to his former client because she was not a named party in Huck's action against her ex-husband, Huck was seeking to limit the former client's right to have contact with Huck's child. This not only affected the former client's ability to be around her boyfriend's child, it also threatened her ability to maintain that relationship. The Court is satisfied that Huck's action was adverse to Whalley's former client.

In determining whether an attorney's representation is substantially related to the subject matter of a previous representation, Maine has adopted the three-part analysis set out in *Novo Therapeustik Lab. A/S v. Baxter Travenol Lab.*, 607 F.2d 186, 195 (7th Cir. 1979):

Initially, the [court] must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been to a lawyer representing a client in

those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

Adam v. MacDonald Page & Co., 644 A.2d 461, 463 (Me. 1994) (citations omitted).

Whalley represented his former client in a DHS proceeding that challenged her parental rights. He testified that he would have gathered information about the former client's parenting, and her alleged substance abuse problem. The information he obtained from his client would have been directly relevant to the issues presented in Huck's protective order: whether or not a child could responsibly be left in the care of the former client. Accordingly, the Court finds that the representation of Huck was substantially related to the previous matter.

The Board also charges that the letter Whalley sent to counsel for Huck's ex-husband violated M. Bar. R. 3.6(h), which provides, *inter alia*:

[A] lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of the client; use such confidence or secret to the disadvantage of the client; or use such confidence or secret to the advantage of the lawyer or a third person.

...

As used herein, "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client.

Whalley's principal defense to the Board's charge is to point out that the former client brought a third party with her when she met with Whalley and

discussed the facts of her case, and that the Hucks obtained their information about his former client from material given to them by parties other than Whalley. While these facts may be sufficient to call into question any assertion by the former client that the material was subject to the attorney-client privilege, M. Bar R. 3.6(h) specifically covers more than privileged information. It also covers information obtained in the course of representation that would be “embarrassing or detrimental to the client.” M. Bar R. 3.6(h)(5). Whalley’s assertion in the letter that he was involved in the DHS proceeding and that he expected DHS would not allow his former client to retain custody of her child was embarrassing and detrimental to the client. The most logical purpose of such a statement was to advantage the Hucks by discouraging any further negotiation on the pending motion to modify the divorce judgment.

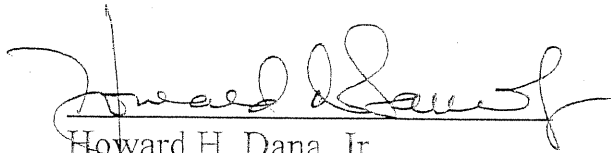
Although Whalley offers a number of explanations and defenses for his decision to proceed with the representation, the Court is satisfied that the Board has met its burden of proof that the rules were violated.¹ When an attorney believes that there is serious doubt as to whether representation is permissible, the Maine Bar Rules provide a solution: obtaining the permission of the former client. Unfortunately, Whalley chose not to pursue this option.

¹ Although the information filed by the Board also charged that Whalley’s conduct violated M. Bar R. 3.5, which governs the mandatory withdrawal of a lawyer, Bar Counsel did not address this violation in its closing arguments. In light of the findings contained in its order, the Court does not find it necessary to address this issue.

Having determined that Whalley's conduct violated the Bar Rules, the Court must determine what sanction is appropriate. The primary purpose of attorney discipline is not to impose punishment, but to protect the public. The Court is satisfied that in this case, Whalley acted with the sincere belief that his conduct was ethically responsible. Whalley did inform the Hucks that if the matter could not be settled before trial, he could not ethically continue to represent them. Although Whalley made a mistake about the location of the boundaries drawn by the Bar Rules, the Court does not expect perfection from all those who practice law. The correct decision in this case was not obvious, a fact reflected in Bar Counsel's initial recommendation that this matter be dismissed by the Grievance Commission. Because the evidence supports a finding that Whalley made the wrong decision in a close call, the Court believes that a reprimand is sufficient to ensure further compliance with the letter and spirit of the Bar Rules.

It is therefore ORDERED that Christopher J. Whalley is hereby reprimanded for his violation of M. Bar. R. 3.4(d)(1) and 3.6(h)(1).

Dated: July 19, 2005


 Howard H. Dana, Jr.
 Associate Justice
 Maine Supreme Judicial Court

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