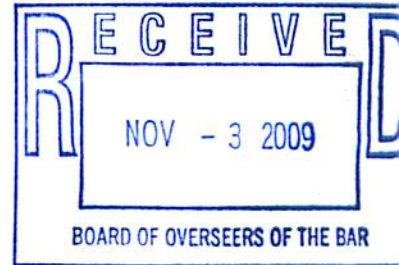


STATE OF MAINE

Board of Overseers of the Bar

GCF # 06-246; 08-447



Board of Overseers of the Bar	)	
Petitioner	)	REPORT OF FINDINGS
v.	)	PANEL E OF THE
	)	GRIEVAMCE COMMISSION
Clarence H. Spurling, Esq.	)	
Of Gardiner, Maine	)	
Bar Number 7416	)	
Respondent	)	

On September 29, 2009, with due notice, Panel E of the Grievance Commission conducted a public disciplinary hearing, open to the public, pursuant to Maine Bar Rule 7.1(e)(2). The disciplinary proceeding was commenced by the filing of a Disciplinary Petition by the Board of Overseers of the Bar [the Board] on February 10, 2009 (GCF# 06-246) and May 28, 2009 (GCF # 08-447). These petitions were consolidated for hearing. The petitions allege violations of M. Bar Rules, 3.1(a), 3.4(d) and 3.6(h).

At the hearing, the Board was represented by Assistant Bar Counsel Aria eee and the Respondent, Charles H. Spurling, Esq. was represented by Julian L. Sweet, Esq. The complainant in 08-447, Nadine Hinkley (formerly Nadine Hurley) was also present. The Respondent, Ms. Hinkley, Attorneys Alice Knapp and Barbara Raimondi testified. The Panel accepted into evidence Board Exhibits 1-23, 29, 30, 33, and 34, and Respondent Exhibits1-8.

**FINDINGS**

Respondent Clarence H. Spurling of Gardiner, Maine, has been at all times relevant to the petitions an attorney admitted to and engaged in the practice of law in the State of Maine and subject to the Maine Bar Rules. Attorney Spurling was admitted to practice in 1991 and he is in a private practice in Gardiner.

Respondent has extended family in the community in which he practices. Among them is a cousin John P. Hurley, who was married for many years to Nadine G. Hinkley [then Hurley]. Ms. Hinkley was involved in a rear-end collision in 2001 and retained Respondent to pursue her claim for damages. Her principal claim was for the loss of her vehicle, but personal injury was also an element of damages. Ms. Hinkley's deposition was taken on May 16, 2003, and the matter settled in September 2003 on the eve of jury selection. Near the end of the personal injury case, Ms. Hinkley was at least contemplating

divorce and approached Respondent for representation. He declined to represent her, because of his family relationship with Mr. Hurley.

Ms. Hinkley filed for divorce in August 2005 and Mr. Hurley asked Respondent to represent him. Respondent considered the matter and made a determination that his former representation of Nadine [Hinkley] was not a conflict within the meaning of the Maine Bar Rules, and entered his appearance on behalf of Mr. Hurley. Ms. Hinkley's first counsel, Attorney Knapp, also had a conflict of interest because she had initially discussed joint representation with both parties, and drafted a settlement agreement between them. Ms. Hinkley wanted Attorney Knapp to continue in the case representing her, and offered several times that each party waive the conflict for Attorneys Knapp and Spurling respectively. Respondent made it clear that Mr. Hurley was unwilling to waive Attorney Knapp's conflict, but, since he perceived no conflict on his own part, Respondent intended to proceed with representing Mr. Hurley.<sup>1</sup> Attorney Knapp then filed a motion in the District Court to disqualify Respondent as Mr. Hurley's attorney and withdrew from representing Ms. Hinkley. The motion was prosecuted by successor counsel, Attorney Raimondi. Respondent vigorously opposed his own disqualification, arguing to the District Court that Me. Bar Rule 3.4(d)(1)(i) did not apply in the circumstances of this case and that he should not be removed. *Bd. Ex. 9, 10, 12.*

The District Court had a testimonial hearing, and, on June 9, 2006, the District Court filed a Decision and Order removing Attorney Spurling as defendant's counsel. *Nadine G. Hurley vs John P Hurley*, Docket No. WES-FM-05-364.

Maine Bar Rule 3.4(d)(1)(i) prescribes a two pronged test for disqualification from representing an adverse party in a successive case:

- (i) Except as permitted by this rule, 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. [*emphasis added*]

The District Court found that the personal injury case raised questions of Ms. Hinkley's "...health, prior injuries, work history and income-earning capacity," which would also be at issue in a divorce case if the Court were required to resolve issues of spousal support, attorneys fees, or parental

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<sup>1</sup> Attorney Knapp explicitly threatened to make a Bar complaint if Respondent did not advise Mr. Hurley to sign a waiver, or withdraw. Since Respondent did neither, and Ms. Hinkley eventually did file a complaint, Respondent has characterized the complaint as "retaliatory." Since *this* complaint was made two and one half years after the fact, it is difficult to see it as retaliatory. In any event, Attorney Knapp's motives are not relevant to the Panel's decision, which focuses on the Respondent's conduct.

rights and responsibilities. Thus, the divorce case met the “substantially related” prong of the Rule. *Decision and Order, June 9, 2006 (Bd Ex. 13) at 5*. The District Court also found that Ms. Hinkley had communicated to the Respondent confidential information regarding her health, prior injuries, work history and earning capacity in the course of the personal injury case, thus meeting the second prong of the Rule. *Id, at 6*. Thus, the Court concluded that “Attorney Spurling’s prior representation of Mr. [sic for “Ms.”] Hurley in [a] personal injury action ... is sufficient to disqualify him under Maine Bar Rule 3.4(d)(1)(i).” *Decision and Order, June 9, 2006 (Bd Ex. 13) at 4*. On June 20, 2006 Bar Counsel filed a *sua sponte* grievance complaint against Attorney Spurling for conflict of interest.<sup>2</sup>

Respondent filed an interlocutory appeal from the Decision and Order. Respondent prosecuted the appeal on behalf of Mr. Hurley through the process of settling the record, which was contested in this case. *Bd. Ex. 15, 16, 17*. New counsel appeared and briefed the case for Mr. Hurley at the Law Court. This appeal was decided in *Nadine G. Hurley vs. John P. Hurley, 2007 ME 65* (decided May 22, 2007); the Law Court affirmed the decision of the District Court. The Law Court “use[d] a highly deferential standard of review,” since both prongs of the Rule require a factual determination. The decision was reviewed for clear error; the District Court would be found in error only when there is no competent evidence in the record to support its decision. *Id, ¶ 8*.

From June 2006 to May 2007, Attorney Raimondi felt she was unable to move forward with the divorce, both because the file was transmitted to the Law Court and because dealing with the Respondent on substantive issues would prejudice Ms. Hinkley’s case. The divorce was eventually settled in December 2007.

Shortly thereafter, Ms. Hinkley filed a grievance complaint against Respondent, docketed GCF # 08-447, for his failure to withdraw from his conflicting representation of Mr. Hurley, and cited the following as the resulting injury to her:

Thus my divorce ground to a halt for over sixteen months severely prejudicing me as I was unable to move on from my failed marriage, I was forced to maintain John on my health insurance, I was unable to proceed with a child support hearing and I incurred several thousand dollars defending my ultimately successful motion.

*Bd. Ex. 20*. It appears from her complaint that she was unaware of the pending *sua sponte* Bar Counsel complaint.

At hearing Respondent’s central argument is that the decision in *Hurley vs. Hurley* was a radical departure from the prior law on the scope of disqualifying conflict in successive representation; that no

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<sup>2</sup> The District Court directed that a copy of the Decision and Order be sent to Bar Counsel for review. *Id, fn 3*.

reasonable lawyer in Respondent's position could be expected to anticipate the interpretation of the Rule set forth in the Hurley decision. Thus, Respondent should not be disciplined for pursuing his interpretation of the Rule.

### DISCUSSION

Much of Respondent's evidence at the hearing revisited the facts in both the personal injury case and the divorce, in an attempt to demonstrate that his representation in the divorce matter was not "substantially related to the subject matter of the former representation," nor did it "involve the use of confidential information obtained through such former representation." Respondent sought to demonstrate that, although personal injury was a minor component of the automobile accident case, he never actually learned anything of significance about Ms. Hinkley's health, past injury, or past and future earning capacity.

The Panel rejects this argument for three reasons.

First, Respondent's analysis of his conflict, and of thus his duty to Mrs. Hinkley, must be made at the time that he accepted representation of Mr. Hurley. Facts that came to light after he appeared for Mr. Hurley cannot be used to bootstrap him into compliance with the Rule. Divorces are notoriously changeable as to the issues in dispute. Thus, the Respondent was in error at the time that he concluded that the divorce case was not "substantially related" to his earlier representation of Ms. Hinkley in the personal injury case.

Second, by parallel reasoning, the Respondent was in possession of confidential information from Ms. Hinkley which he may have been called upon to use in the divorce case. This included information about her health, prior injuries, work history and earning capacity. He assisted her in preparing and signing interrogatory answers and objections on these topics. *Bd. Ex. 21, Answers 14 – 22*. That the information was in fact negative or trivial from the Respondent's point of view is beside the point. The significance of the confidential information must be judged from the client's point of view. *See, Grievance Commission Opinion # 2, 10/17/1979; see, M.Bar R. 2(a)*. From a lay person's perspective, the confidential information was significant.

Third, the Panel does not agree that the Law Court's holding in the *Hurley* case was a radical departure from prior law and the generally understood limits of permissible successive representation. The basis for this suggestion appears to be the discussion by the Law Court that confidential information could include "... information about the way in which Nadine [Ms. Hinkley] handled the litigation

process.” 2007 ME 65, ¶ 13. Confidential information of this type was briefly mentioned by the District Court. *Decision and Order (Bd Ex. 13) at 6.*

Moreover, confidential information of this type was discussed in *Adam vs. MacDonald Page & Co.*, 644 A.2d 461 at 464 (Me. 1994). *Adam* was cited with approval by the Law Court in *Hurley*. 2007 ME 65, ¶ 14.

As early as 1979, an Advisory Opinion of the Grievance Commission spoke of “apparent” as well as “actual” disclosure of confidences in a successive representation. *Grievance Commission Opinion # 2, 10/17/1979, at 2.*

Ethical considerations, as well as Rule 3.4(e), suggest avoidance of representation where there may be a *possible* violation of confidence.

*Id.*, 3. [emphasis in original]<sup>3</sup>

The Panel finds that, when approached by Mr. Hurley to represent him in the divorce, the Respondent had a duty to his former client Ms. Hinkley to decline to do so; that this disability should have been apparent to the Respondent at the time; and that this conclusion was not a novel or unexpected interpretation of the Rule.

### CONCLUSION AND SANCTION

The Code of Professional Responsibility establishes the duties owed by an attorney to his or her client. Attorney Spurling substantially deviated from his duties to his former client, Ms. Hinkley, when he accepted representation of Mr. Hurley in the divorce.

M. Bar R. 2(a) provides that the purpose of bar disciplinary proceedings is not punishment, but rather the protection of the public from attorneys who, by their conduct, have demonstrated that they are unable to properly discharge their professional duties. A Public Reprimand serves those purposes.

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<sup>3</sup> The facts in the Advisory Opinion parallel those faced by the Respondent. In that case, the attorney was approached by three tenants of a trailer park to bring suit on their behalf against the park developer for a malfunctioning septic system. Earlier, the attorney had represented the park developer for the real estate transaction acquiring the park property, and in obtaining the local and State approvals necessary to develop the trailer park. The former client believed that the septic system had been an element in the approval process; the attorney believed not. *Id.* The Grievance Commission was of the opinion that the attorney should decline the representation for two reasons. First, to accept the successive representation would erode public confidence in the confidentiality of lawyer communications; second, it would create a risk of later finding it necessary to withdraw, placing an unnecessary burden on the client. *Id.*, 3.

Therefore, the Panel hereby issues a Public Reprimand to Clarence H. Spurling, Esq, as provided by M. Bar R. 7.1(e)(3)(C).

Dated: October 31, 2009

Grievance Commission Panel



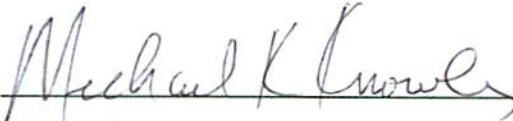
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Victoria Powers, Esq., Chair of Panel E



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Jack Hunt, Esq.



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Michael K. Knowles