

IN RE: ROBERT H. AVAUNT

Order (public reprimand) entered by the Maine Board of Bar Overseers of the Bar on August 22, 2000.

Massachusetts reciprocal reprimand entered on November 30, 2001.

STATE OF MAINE
Kennebec, ss.

Board of Overseers of the Bar
Grievance Commission
File No. 98 141

BOARD OF OVERSEERS OF THE BAR

Petitioner

REPORT OF PROCEEDINGS,
FINDINGS, CONCLUSIONS
AND DISPOSITION

vs.

ROBERT H. AVAUNT, ESQ.
of Falmouth, Maine
Maine Bar # 1436

Respondent

PROCEDURE

On June 21, 2000 and July 19, 2000, Panel D of the Grievance Commission conducted a public disciplinary hearing in this matter at the offices of the Board of Overseers of the Bar, Augusta, Maine. Oral argument was held by conference call on July 28, 2000. The panel was composed of Patricia M. Ender, Esq. of Augusta, chair; Theodore K. Hoch, Esq. of Bath; and F. Celeste Branham, of Lewiston. There were no objections to the composition of the panel. The Board was represented by assistant bar counsel, Geoffrey S. Welsh, Esq. The respondent appeared pro se.

Board Exhibits 1 42, 44 48, 59 63, and 65 79 were admitted. Respondent's Exhibits 1 and 6 15 were admitted. The following witnesses were duly sworn and testified before the panel: Mary B. Devine, Esq., Herbert C. Kontio, Lawrence J. Zuckerman, Esq., and respondent Robert H. Avaunt, Esq.

The amended petition alleges that Respondent violated the Maine Bar Rules 3.1(a), 3.2(f)(1), 3.2(f)(2), 3.2(f)(3), 3.2(f)(4), 3.6(e)(2)(iii), 3.6(e)(4)(iv), and 3.7(b). The Board alleges that Mr. Avaunt paid himself from accounts he managed as conservator/guardian of four veterans without performing work, that he wrongfully failed to disclose receipt of these funds to the firm for which he worked, Zuckerman, Avaunt & Devine, and that he wrongfully withheld fees from the firm. Mr. Avaunt filed an amended answer denying these allegations. No litigation, nor any proceeding before another tribunal, is currently pending regarding claims among Mr. Avaunt, Mr. Zuckerman and Ms. Devine.

FINDINGS OF FACT

The Respondent, Robert H. Avaunt, Esq., was at all relevant times an attorney admitted to the practice of law in the State of Maine.

Mr. Avaunt was a partner in the firm of Zuckerman & Avaunt, which was formed in 1978. In 1983, Ms. Devine joined the firm as an associate. Other attorneys joined the firm as associates. In due course, some associates, including Ms. Devine, became partners. In June 1994, one partner departed from the firm. In March, 1998, Mr. Avaunt resigned from the firm and became "of counsel" until May 11, 1998. Mr. Zuckerman and Ms. Devine continue to practice together, as Zuckerman & Devine.

At all times, Mr. Zuckerman was the managing partner of the firm, and had supervisory responsibility for the support staff. Mr. Zuckerman became personally involved with both the firm's bookkeeper and with Ms. Devine. In 1993, Mr. Zuckerman discovered that the bookkeeper had made unauthorized charges on the firm's credit card. He later determined that she had embezzled at least \$56,722.53 between 1986 and 1993. Mr. Avaunt negotiated an agreement with the bookkeeper and her family for the return of the identified embezzled funds, minus \$2722.53.

In 1990, 1992, and twice in 1995, Mr. Avaunt borrowed money from the firm, at interest. After the bookkeeper was dismissed in 1993, Mr. Avaunt unsuccessfully sought from Mr. Zuckerman the return of the interest he had paid during the period of embezzlement. In December 1996, after many years of significant financial difficulties, Mr. Avaunt filed for chapter 13 bankruptcy.

In March 1998, Mr. Avaunt resigned from the firm and became "of counsel" until May 11, 1998. Mr. Zuckerman, Mr. Avaunt, and Ms. Devine engaged in protracted negotiations for a withdrawal agreement. The parties continue to have disputed claims about what Mr. Avaunt is owed, or what he owes to the firm.

Mr. Avaunt's legal practice has included the representation of veterans. He has been appointed guardian, conservator, and personal representative of the estates of various veterans. As such, he has prepared legal papers to formalize his appointments, paid bills, made medical decisions, and conducted other business on behalf of his clients. In the course of such work, he has prepared regular and detailed accountings to the Veterans' Administration (VA) and to Maine probate courts. He anticipated close scrutiny of such accountings by the Veterans Administration, whose agents did indeed examine and occasionally question minor charges to the accounts. In all instances, any questions by the VA were promptly and simply resolved.

Beginning on November 24, 1994, and occasionally thereafter, Mr. Avaunt wrote checks to himself on the accounts of four veterans, Mr. Gregor, Mr. LaCasse, Mr. McCartney and Mr. Gildard, which checks he charged as guardianship and conservator fees on the accountings to the VA and probate courts, but which, he did not disclose to the firm.

In the Gregor case, Mr. Avaunt paid himself guardianship/conservator fees of \$737.50 on check # 160 dated November 25, 1994, without disclosure to the firm. He disclosed to the firm similar fees of \$537.50 on check # 174 dated March 6, 1995. On July 25, 1995, however, he again collected guardianship/conservator fees of \$1000, on check # 194, which he failed to disclose to the firm.

Similarly, in the LaCasse case, Mr. Avaunt paid himself \$625.00 on check # 141, dated November 25, 1994 for guardianship/conservator fees which he did not make known to the firm. He disclosed to the firm fees of \$362.50 paid on check # 146 dated February 25, 1995; failed to disclose fees of \$187.06 paid on check # 164 dated January 6, 1996; disclosed fees of \$800 paid two days later on January 8, 1996 on check # 165; and also disclosed fees of \$100 paid on April 6, 1996 on check # 170 dated April 6, 1996.

In the McCartney matter, Mr. Avaunt paid himself guardianship/conservator fees of \$625.00 on check # 381 dated November 25, 1994 which he failed to disclose to the firm. He further failed to disclose fees of \$168 he paid himself on check # 387 dated March 6, 1995, and of \$295.81

on check # 397 dated September 5, 1995.

In the Gildard case, Mr. Avaunt advised his firm of guardianship/conservator fees he paid himself on check # 121 for \$62.50 dated January 18, 1996, on check # 127 for \$50 dated February 12, 1996, and on check # 135 for \$125 on March 16, 1996. On April 16, 1996 at Maine Tire, however, he negotiated check # 140 to himself for \$100 for guardianship/conservator fees, which he did not disclose to the firm. He disclosed to the firm fees of \$1215 on check # 170 dated November 14, 1996.

The six checks issued between November 24, 1994 and April 16, 1996 which Mr. Avaunt paid to himself for guardianship/conservator fees, but which he did not disclose to the firm before July 1998, total \$3274.56.

After Mr. Avaunt gave notice of his resignation in March 1998, the firm began negotiating a withdrawal agreement. Through several drafts, Mr. Avaunt insisted on modifying a clause regarding earned fees, to the puzzlement of the remaining partners. In July 1998, Mr. Avaunt revealed to Mr. Zuckerman that his insistence was because he had not previously disclosed to the firm certain payments he had made to himself for guardianship/conservator fees. The particular files and checks involved were reviewed and compared to the fees listed on the VA and probate court accountings.

After consulting with counsel, Ms. Devine reported Mr. Avaunt's conduct to the Board, which conducted an investigation and held a case review before a panel of the grievance commission. That panel found probable cause to believe that misconduct subject to discipline under the bar rules had occurred, resulting in the public hearing before this panel.

CONCLUSIONS

I. Jurisdiction and Deferral

Respondent requests that the panel determine it lacks jurisdiction in this case, or, at least, that it defer its decision until after he, Mr. Zuckerman, and Ms. Devine have litigated their claims. The panel has jurisdiction over the matter pursuant to Maine Bar Rule 7(e).

The panel, at the outset of the hearing, asked if any litigation was pending in this matter. There being no pending case before another tribunal in this matter, Bar Regulation 12 does not apply and the panel cannot justifiably delay or defer a decision in this matter.

II. Regarding allegations of collecting unearned fees

Mr. Kontio, of the Veterans Administration, testified regarding the usual and customary standard of reasonableness for guardianship/conservator fees in Maine, for cases such as those handled herein by Mr. Avaunt. Mr. Avaunt's fees are within these standards. Mr. Avaunt testified that he reported all his fees in detail to the Veterans Administration and the probate courts. The Veterans Administration examined and approved the accountings, and, in some instances, forwarded them to the appropriate probate court. The Veterans Administration did not disapprove any fee which is the subject of this case. Therefore, the panel finds that the evidence does not support the Board's allegation that Mr. Avaunt did not earn the fees charged in these four cases.

III. Regarding allegations of dishonesty in dealing with the firm

The panel finds that Mr. Avaunt's failure to timely disclose to his firm the fees he paid himself on the four accounts, in six checks between November 24, 1994 and April 16, 1996, totaling \$3274.56, violates Maine Bar Rule 3.1(a) regarding conduct unworthy of an attorney, and Maine Bar Rule 3.2(f)(3) regarding conduct involving dishonesty and deceit.

Despite the personal conduct at the firm in the years preceding and during the period Mr. Avaunt failed to disclose these fees to the firm, Mr. Avaunt's nondisclosure was not justified. Mr. Avaunt continues to rationalize his behavior based upon the misery he experienced in his work environment and the financial consequences to him of the bookkeeper's embezzlement, which he attributes in large part to Mr. Zuckerman's failure to supervise and confront a subordinate with whom he was conducting an affair. Yet Mr. Avaunt's own inconsistency in advising the firm of some fees on these accounts, but not others, shows that he was aware of his duty to disclose the fees to the firm and that he knowingly failed to do so. Mr. Avaunt practices a profession which encourages self restraint, and eschews self help remedies. His nondisclosure of the fees he collected violated these fundamental principles.

Although Mr. Avaunt retains the fees he initially failed to disclose from the firm, the current partners of the firm and Mr. Avaunt have unresolved financial claims among themselves. The panel also finds that, but for Mr. Avaunt's revelations to Mr. Zuckerman in July, 1998 that he had withheld the funds from the firm, his failure to disclose the fees would not have come to light. Mr. Avaunt's belated disclosure will facilitate more accurate resolution of the financial claims among him and the complainants.

DISPOSITION

The respondent has no prior disciplinary record. Panel D determines that the appropriate disposition is that the respondent should be and hereby is reprimanded for failing to make timely disclosure to the firm of his receipt of six checks for guardianship/conservator fees between November 1994 and April 1996. The remaining allegations are dismissed.

Dated: August 22, 2000 _____
Patricia M. Ender, Esq., chair

Theodore K. Hoch, Esq.

F. Celeste Branham