FRANK ARTHUR SMITH, III

Public Reprimand No. 2019-16

Order (public reprimand) entered by the Board on November 6, 2019.

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COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL,	)
Petitioner,	)
v.	)
FRANK ARTHUR SMITH, III, ESQ.,	)
Respondent.	)

BOARD MEMORANDUM

Rule 1.6(a) of the Massachusetts Rules of Professional Conduct forbids a lawyer from revealing "confidential information relating to the representation of a client … ."

In this case, the respondent posted information about a client's case on social media, information that was seen by the client and her daughter and potentially many others. Concluding that the information was confidential, we hold that the respondent violated Rule 1.6(a). In doing so, we disagree with the hearing committee, which recommended dismissal based on its conclusion that the information was not confidential. We take the opportunity to reiterate the board's view of the law on confidentiality and its application to social media.

The Committee's Findings of Fact

With one exception discussed below, we adopt the facts found by the hearing committee, as they are not erroneous. BBO Rules, § 3.53. They are supported by the evidence.

A client, whom the hearing committee referred to as Jane Doe, hired the respondent in September 2015 to represent her in connection with a petition for guardianship of Doe's six-year old grandson, A.S.

In a Care and Protection ("C&P") proceeding, the Massachusetts Department of Children and Families ("DCF") had previously been awarded custody of A.S. and placed him in Doe's home in Randolph, where Doe's daughter (A.S.'s mother) also lived.[1] In connection with the C&P case, Doe sought guardianship of A.S. By statute, C&P hearings are closed to the public and publishing the names of persons before the court is unlawful. Mass. G.L. c. 119, § 38.

In July 2015, after an altercation between A.S.'s mother and another relative living in the home, DCF removed A.S. from Doe's house to a foster home in Berkshire County. In September, 2015, another party (un-named in the pleadings) filed a so-called "abuse of discretion" motion, arguing that DCF had abused its discretion in making a prior finding of neglect of A.S. against that party. This motion was filed in connection with the same C&P case. The move prompted Doe to file a motion to intervene in the Berkshire County Juvenile Court so that she could press her petition for guardianship. The judge denied the motion to intervene, but allowed the respondent to observe the hearing on the abuse of discretion motion.

On September 22, 2015, the respondent appeared at a hearing in Juvenile Court. The judge gave the respondent until October 2015 to present his client's guardianship petition. The day after the hearing, September 23, 2015, the respondent posted the following on his personal Facebook page, which was public and had no privacy setting:

> I am back in the Boston office after appearing in Berkshire Juvenile Court in Pittsfield on behalf of a grandmother who was seeking guardianship of her six year old grandson and was opposed by DCF yesterday. Next date – 10/23.

Two people responded to the respondent's public Facebook post. The first (a lawyer in Massachusetts who is a Facebook friend of the respondent) asked, "What were the grounds for

[1] The reasons for DCF to place the child in the home of his grandmother, where his mother also lived, are not known.

opposing"? To which the respondent replied: "GM [grandmother] will not be able to 'control' her daughter, the biological mother, and DCF has 'concerns.' Unspecific." The friend responded (with apparent sarcasm), "DCF does have a sterling record of controlling children and questionable mothers, after all." The respondent similarly replied, "Indeed."

A second Facebook friend of the respondent (who is not an attorney) wrote, "So, what's the preference ... Foster care? What am I missing here"? The respondent answered, "The grandson is in his fourth placement in foster care since his removal from GM [grandmother]'s residence in late July. I will discover what DCF is doing or not doing as to why DCF opposes the GM [grandmother] as guardian. More to come."

Ultimately, the Juvenile Court ruled in favor of Doe's guardianship petition. On December 15, 2015, the court appointed Doe the permanent guardian of A.S.

On December 19, 2015, Doe's daughter spoke with Doe by phone. Apparently as a result of the conversation, Doe learned for the first time of the respondent's Facebook post back in September. Although not a Facebook "friend" of the respondent, Doe was able to find the post. She did not confront the respondent at the time she discovered the post.

During the pendency of the guardianship case, Doe hired the respondent to represent her in her divorce. The attorney-client relationship quickly deteriorated due to, among other things, a disagreement about the veracity of a financial statement Doe wanted to file in the Probate Court. Apparently, there were also issues about invoices sent to Doe by the respondent in both the divorce and guardianship matters.

On March 9, 2016, Doe raised with the respondent – for the first time – the Facebook post, even though she had known about it since December.[2] In an email the next day, March

[2] The substance of the March 9 communication does not appear in the record.

10th, the respondent wrote to Doe that he had been unsuccessful in his attempt to continue a hearing in the divorce case and warned that her husband's attorney intended to file a motion for discovery and for Doe to submit a financial statement. In a subsequent email, the respondent wrote that he was "unable to represent you if you will not comply with the court rules" and that he would be filing a motion to withdraw.

In her response the next day (March 11th), Doe wrote that the respondent "seem[ed] to think that discussing my custody case (and who knows what else) with your Face book [sic] buddies on an open account ... is okay and at the least just [a] mistake. I beg to differ. Posting client information on Face book [sic] is a violation of the attorney client law." She finished her email by offering to "just walk away from this matter and continue things without your representation, consider the monies I paid to you as a final bill." She threatened to file a complaint with the Office of Bar Counsel if the respondent did not agree to her proposal.

The respondent replied to the email by denying that he had discussed "our attorney-client communication with anyone" and said that his post was limited to "from where I was returning and DCF's position only." That statement was inaccurate, since the respondent's Facebook posts included information about his client and the salient issues in the case.

Bar counsel alleged that the respondent's conduct violated Rules 1.6(a) and 8.4(d) of the Massachusetts Rules of Professional Conduct, the latter of which proscribes conduct that is prejudicial to the administration of justice. After an evidentiary hearing, the hearing committee recommended that the petition be dismissed. An appeal to the board, with oral argument, followed.

Discussion

I. Rule 1.6(a)

Rule 1.6(a) of the Massachusetts Rules of Professional Conduct prohibits lawyers from "reveal[ing] confidential information relating to the representation of a client ..." Exceptions to the rule are not relevant to this case.

Comment [3A] to the rule defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential." With relevance to this case, Comment [3A] further explains that, "'[c]onfidential information' does not ordinarily include ... information that is generally known in the local community or the trade, field or profession to which the information relates."

Further, Comment [4] warns that the prohibition on revealing confidential information "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." (emphasis added).

Bar counsel argues that the information revealed by the respondent on Facebook falls into the second category of Comment [3A]: likely to be embarrassing or detrimental to the client if disclosed. We agree. Information that a person is involved in a DCF proceeding concerning her grandchild would likely be embarrassing or detrimental to the client, as would be the revelation that DCF opposed her being the guardian. The follow-up disclosures about the grandson having been previously removed from the home and DCF's concerns that the client could not "control"

her daughter (the mother of the ward) were similarly pejorative. While not the only relevant factor here, we note that C&P cases are confidential by statute and for solid policy reasons.

In recommending dismissal of the petition for discipline, the hearing committee concluded that, "the information at issue could only be embarrassing or detrimental to Doe if it could reasonably be linked to her." (Hearing Report, p. 8). Based on its reading of Comment [4], the hearing committee concluded that, "there must be enough revealed to get to a certain threshold, some identifiable or linear nexus reasonably connecting the information to a particular person." (Hearing Report, p. 10). Thus, in recommending dismissal of the petition, the hearing committee found that, "There is no reasonable likelihood that the client could have been recognized." (Hearing Report, p. 11).

While it is not necessary for us to address the committee's legal conclusion (that information falls within Rule 1.6(a) only if it could reasonably be linked to the client), we disagree with its analysis of the facts, specifically, that there was an insufficient connection to the client in the Facebook post. We decline to adopt its factual finding, which is not based on the credibility of witnesses. *See* B.B.O. Rules, § 3.53. Doe and her daughter both recognized that the Facebook post concerned Doe. The post disclosed sufficient information that it was clear to Doe's daughter that the post referred to her mother.[3] Thus, bar counsel produced sufficient evidence to prove a violation of Rule 1.6(a).

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[3] The hearing committee discounted the daughter's knowledge of the facts, reasoning that, "the hypothetical third person must not be someone who already knows the facts but, rather, someone without prior knowledge." (Hearing Report, ¶ 36). This statement finds no support in the rule. It would be impractical to enforce, since it would require bar counsel to prove that the third party did not – and reasonably could not – have known of the facts prior to the disclosure. More importantly, the committee's interpretation would undermine the purpose of the rule, which is to require lawyers to protect confidential client information. Indeed, a critical component of Rule 1.6(a) is that confidential client information may include facts that are known by third persons if they are not otherwise generally known. Restatement (Third) of the Law Governing Lawyers, § 59 (1998), *cited in* Matter of Doe, 18 Mass. Disc. R. 586, 595 (2001), 437 Mass. 1001 (2002) (rescript).

Even if there were no evidence that a third party actually recognized the client in the post, we would still conclude that the respondent had violated Rule 1.6(a). There is no requirement that a third party actually connect the dots. If it would be reasonably likely that a third party could do so, the disclosure runs afoul of the rule. In addition to her daughter knowing about the case, Doe could have mentioned to a friend that the respondent was representing her in a case (perhaps in connection with making a referral). If the friend looked up the respondent on Facebook, the friend would learn about the "grandmother" and her litigation with DCF. There are numerous other reasonable scenarios.

Cases from other jurisdictions have sanctioned lawyers for disclosing confidential information that a reasonable person could connect to the client even if the client was not specifically identified. In Illinois (and in Wisconsin on reciprocal discipline), a state public defender consented to a 60-day suspension for posting information about her clients on a blog. Although she did not name the clients, she posted information such as prison identification numbers and nicknames that would have revealed their identity. Matter of Peshek, No. M.R. 23794 (Ill. 2010); *see also* Office of Lawyer Regulation v. Peshek, 798 N.W.2d 879 (Wis. 2011).[4] In Matter of Mahoney, Disciplinary Docket No. 2015-D141 (D.C. 2016), a lawyer replied to a client's anonymous review on his website by revealing specific information about her case, her emotional state, her employer, and relevant dates. Imposing an informal admonition (the equivalent of our public reprimand), the disciplinary board concluded that the information, "could lead back to [the] former client." Id. at 2-3.

[4] The Peshek case is very similar to this one. As with the court officers and others involved in the justice system in Illinois, here DCF personnel, court personnel in the Juvenile Court and possibly others such as social workers could reasonably connect the Facebook post to Doe.

We do not share the hearing committee's apprehension that our application of Rule 1.6(a) to this case would inhibit lawyers in discussing cases with other lawyers in order to obtain advice. Nothing in our decision announces a new rule. We have not broadened the scope of confidentiality. We have applied the Rule, as explained by Comment [3A], to the respondent's Facebook disclosure about his client. More importantly, Comment [4] to Rule 1.6(a) expressly anticipates and allows "shop talk" (in the words of the committee, page 10 of its report) among lawyers.[5] In posting on Facebook, the respondent did not seek advice from other lawyers, nor can we discern any other purpose that would have served his fiduciary duty to his client. There is no legitimate analogy between seeking advice from other lawyers and the respondent's Facebook post.

The internet and social media have dramatically expanded opportunities for attorneys to communicate with the public about their work. This is beneficial for many obvious reasons. We understand the temptation of using social media in a professional setting. At the same time, the availability of social media has not changed the Rules of Professional Conduct nor minimized their importance, particularly when it comes to protecting client confidences, a pillar of our profession. In the absence of client consent, implied authorization, or an exception under Rule 1.6(b), attorneys must jealously guard their client secrets. *See* American Bar Association, Formal Opinion Number 480, Confidentiality Obligations for Lawyer Blogging and Other Public Commentary (March 6, 2018). Indeed, social media has increased the consequences of disclosing confidential client information: once a fact is on the internet, its scope and duration

[5]In pertinent part, Comment [4] provides, "A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved." That is not what occurred here.

are virtually limitless. Given the reach of the internet, lawyers must use extra caution when discussing client matters on social media.

II. Rule 8.4(d)

Agreeing with the hearing committee, we conclude that the respondent did not violate Rule 8.4(d) of the Massachusetts Rules of Professional Conduct. Both the hearing committee and the respondent have characterized the respondent's conduct as an "indiscretion." To the extent that the term is intended to be exculpatory, we disagree. As discussed above, the respondent's "indiscretion" led him to disclose confidential information in violation of Rule 1.6(a).

Nevertheless, we agree that the conduct did not prejudice the administration of justice such as to violate Rule 8.4(d). Although the posts concerned a confidential court hearing, there is nothing in the record to indicate that they interfered with the ability of the court to conduct its business or that they affected the rights of any of the parties to the proceeding.

In sum, we agree with the conclusion of the hearing committee that the respondent did not violate Rule 8.4(d), but we disagree with its conclusion as to Rule 1.6. Since we have concluded that the respondent violated the rule and that discipline is warranted, we will now turn to matters in mitigation and aggravation as well as the appropriate sanction.

Matters in Mitigation and Aggravation

Although the hearing committee recommended dismissal, its report helpfully discussed potential matters in mitigation and aggravation in the event that the board disagreed with its recommendation.

The hearing committee would not have considered the respondent's experience as a factor in aggravation. We do. The court has long recognized experience as an aggravating

factor. Matter of Crossen, 450 Mass. 533, 580, 24 Mass. Att'y Disc. R. 122, 179 (2008); Matter of Luongo, 416 Mass. 308, 312, 9 Mass. Att'y Disc. R. 199, 203 (1993) ("An older, more experienced attorney should understand ethical obligations to a greater degree than a neophyte"). The respondent has been a member of the bar since 1977. He is an experienced attorney. He should understand the importance of protecting client confidences. He should understand the public policy behind the confidentiality of Care and Protection cases. While we decline to hold that the respondent violated Rule 8.4(d), his experience should have caused him to proceed with extreme caution before disclosing any information about his client's case in light of Mass. G.L. c. 119, § 38.

In addition, social media is not new. Facebook was established in 2006. It (along with other social media such as Twitter, Instagram, and LinkedIn) are part of the everyday lives of most Americans.[6] Moreover, Comment [8] to Mass. R. Prof. C. 1.1 requires that lawyers keep abreast of changes in the law, including the "benefits and risks associated with relevant technology." Having chosen to use Facebook, the respondent was required to follow the rules for maintaining client confidences on its platform.

We agree with the hearing committee that two of the respondent's proffered facts in mitigation are those we deem "typical" and therefore deserving of no weight: lack of disciplinary history and diligent work on behalf of the client. The other two arguments in mitigation – that no one other than his client and her daughter apparently saw the posts and that the respondent did not act with malicious intent – were addressed on the merits.

We do not agree with bar counsel that the respondent's failure to acknowledge the nature and implications of his misconduct should be held against him in aggravation. Respondents are

[6] As of September, 2019, Facebook has over two billion users worldwide. (*See* www.statista.com/statistics).

entitled to defend themselves in a bar discipline proceeding. The arguments made by the respondent (through counsel) were not frivolous, nor did they indicate a lack of awareness of fundamental ethical duties.

We agree with the hearing committee that the respondent's March 11, 2016 letter to his client, although incomplete, was neither intentionally false nor misleading. In response to Doe's accusation that he had disclosed confidential information about her, the respondent wrote that he would send a formal response by mail and that he had "not discussed our attorney-client relations with anyone" and that his September 23, 2015 Facebook post was only about where he had been and DCF's position. While not entirely complete, the respondent's March 11, 2016 email to Doe was sent only to her. His email was intended as a summary.

Lastly, we agree with the committee that there was no evidence that the client was harmed or prejudiced in the pursuit of custody of her grandson. At the hearing, Doe testified that she felt "betrayed" and "angry" when she read the posts about her case. (Hearing Report, ¶ 14). However, she did not raise the issue with the respondent until months later, in March, 2016. We will not disturb the committee's factual finding (based on its assessment of Doe's credibility) that her protestations were insincere.[7]

The Appropriate Sanction

Our prior decisions discussing possible discipline for Rule 1.6 violations each stands on their own facts, we have in the past imposed discipline ranging from admonitions to public reprimands for violations of Rule 1.6(a). We recognize that in some instances an admonition

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[7] The respondent argues that Doe raised the issue at the time in order to gain leverage in a dispute over the bill for legal fees. We cannot – and need not – resolve this issue, which is immaterial to whether the respondent violated Rule 1.6(a). As a general matter, a client's motives are irrelevant to our determination whether a lawyer has violated the Rules of Professional Conduct.

has been imposed, but those decisions did not involve aggravating factors such as those that are present here.

In Matter of Bulger, 29 Mass. Att'y Disc. R. 65 (2013), the respondent was chief legal counsel for the Department of Probation. After the Commissioner of Probation was placed on leave pending an investigation of the department's hiring practices, the respondent communicated with the Commissioner about the investigation. In doing so, he disclosed confidential information. We imposed a public reprimand and cited the ABA Standards for Imposing Lawyer Discipline, § 4.2, which provides that an admonition is appropriate only where the disclosure was negligent and resulted in no harm to the client. Id., at 68. While harm to the client in this case may be in doubt, the respondent's disclosure was not negligent. His was not an inadvertent mistake; he knew that he was posting information on his public Facebook page. In the same case, we quoted with approval the following instruction from the ABA: "Maintaining a client's confidence is so fundamental to the professional relationship that generally it is inappropriate to impose a private sanction." Id.

Bulger involved several aggravating factors, including his concern for the Commissioner, who had been responsible for his promotion at the department, to the detriment of the investigation; the blatant impropriety of the disclosures; the repeat nature of the disclosures; and the respondent's apparent lack of insight into the wrongfulness of his conduct. Although not all of these factors are present here, it should have been obvious to the respondent that the information he disclosed was confidential. Although he did not disclose the information over a lengthy time period, he disseminated the information widely on social media. And critical to our decision is the aggravating factor of the respondent's experience.

In cases from other states, lawyers have received public reprimands or even suspensions for posting confidential client information on social media. In Matter of Peshek, *supra*, a public defender consented to a sixty day suspension after she posted information about her criminal defense clients. Although she did not identify the clients, she provided sufficient information (such as prison identification numbers or nicknames) that would have allowed third parties (including court personnel and others involved in the justice system) to connect them to the posts. In In re Tsamis, Ill. Atty. Reg. & Disc. Comm., No. 2013PR00095, another Illinois lawyer stipulated to a public reprimand for posting confidential information about a client in response to an on-line review. In Matter of Eversole, ASB No. 2015-244 (Alabama 2015), the Alabama Bar Disciplinary Commission imposed a public reprimand when an attorney posted confidential information about a client in reply to an anonymous negative on-line review. In Matter of Quillinan, 29 DB Rptr. 288 (Ore. 2006), the Oregon Supreme Court suspended a lawyer for ninety days for sending an email to an attorney listserve in which he disparaged a former client and disclosed personal and medical information about the client.

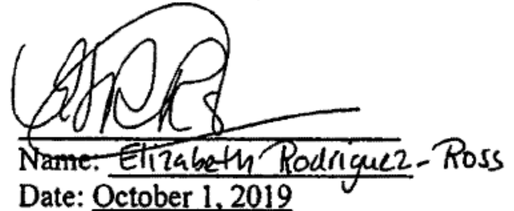
Unlike the admonition cases relied on by our fellow board members who would prefer an admonition, the respondent's disclosure about Doe was not limited to a message board or a single recipient. By posting on Facebook, the respondent potentially disclosed his client's information to anyone with an internet connection or cell phone service. The post is no different than publishing the facts in a newspaper or broadcasting them on television. Furthermore, the matter discussed by the respondent here was a sensitive child custody case that our legislature has deemed to be worthy of confidential protection by statute, Mass. G.L. c. 119, § 38. The respondent's conduct ignored not only the basic tenets of Rule 1.6, but the basic confidentiality requirements that all attorneys who handle these sort of child custody and protection matters

should honor. These facts separate this matter from other previous cases where a private admonition was determined to be an appropriate sanction.

In sum, we view the respondent's conduct as a serious breach of the client's trust, aggravated by his experience and the fact that it occurred in the context of a Care and Protection case. Confidentiality is a central tenet of our profession. If nothing else, the public knows that attorneys are obligated to protect their confidences. This obligation exists to encourage clients to be truthful and to place great trust in their counsel. By posting information about his client on Facebook, the respondent jeopardized that trust. Public discipline is warranted.[8]

Conclusion

For all the foregoing reasons, we impose a Public Reprimand on the respondent.



Name: Elizabeth Rodriguez-Ross
Date: October 1, 2019

[8] We agree that bar counsel has not proven a violation of Rule 8.4(d).

OPINION CONCURRING IN PART AND DISSENTING IN PART

We concur in the decision of the majority of the board voting on this case to the extent the majority rejects the hearing committee's recommendation that the petition be dismissed. For the reasons set forth in the majority opinion, the respondent violated Rule 1.6(a) when he disclosed information about a client matter in three Facebook posts. Discipline is warranted.

We respectfully dissent from the recommended disposition. We would impose an admonition, which is consistent with our precedent.

We have imposed admonitions for violations of Rule 1.6(a). For example, in Ad 09-18, 25 Mass. Att'y Disc. R. 685 (2009), a client criticized the respondent's tax advice and fees on an internet bulletin board. In his reply, the respondent disclosed the client's purported substance abuse and "other highly confidential information that the respondent had gained during the course of the representation." Arguably, the information disclosed in that case was more embarrassing and detrimental than the information the respondent disclosed about Doe in this case. In Ad 07-35, 23 Mass. Att'y Disc. R. 1015 (2007), a lawyer was involved in a fee dispute with his client, who had charged the legal fee to his credit card but then disputed the charge. In corresponding with the bank, the lawyer revealed confidential information about the client learned in the course of the engagement that was irrelevant to the fee dispute. He also sent the bank a copy of the fee agreement. In Ad 11-21, 27 Mass. Att'y Disc. R. 972 (2011), a lawyer's motion to withdraw, which was not impounded, included confidential information about his client, including emails and an invoice.

While we find that the respondent's conduct was indiscreet and ill-advised, we also find that it was without any intent to identify his client or to disclose confidential information as to

the particular client. In doing so, we do not condone the conduct. However, we feel constrained by our case law to limit the sanction to a private admonition based on the Hearing Committee's finding that the respondent's conduct did not reasonably lead to the discovery of confidential information by a third person.

Marianne LeBlanc, Esq.
Date: October 1, 2019

Kevin Scanlon, Esq.
Date: October 1, 2019