Effective 2-16-96

In re:

Complaint as to the Conduct of

ARTHUR B. LAFRANCE,

Accused.

OPINION OF THE TRIAL PANEL

INTRODUCTION

THIS MATTER came before the Trial Panel for hearing on November 16 and 17, 1995. The accused appeared in person and represented himself. The Bar appeared through OSB Disciplinary Counsel Jeff Sapiro and trial counsel Michael P. Opton.

Testimony was received from Judge Charles A. Sams on November 16, 1995, and from Accused Arthur B. LaFrance on November 17, 1995.

At the commencement of the hearing, it was stipulated by the parties that a transcript of testimony of witnesses from a substantially similar proceeding conducted by the State of Maine Board of Bar Overseers could be considered by the Trial Panel to the same extent as if those witnesses had appeared in person in this proceeding. In addition, it was stipulated that exhibits from the Maine proceeding would be admitted as evidence in this hearing, to be given such weight as the trial panel deemed appropriate. The

trial panel was asked to rule independently on any objections preserved by the parties in the Maine proceeding. Bar exhibits numbered 1 through 51 were received, and the Accused's exhibits numbered 1 through 10 were also received. The members of the Trial Panel have read and considered the voluminous evidence received pursuant to these stipulations.

The hearing was conducted on the Bar's Amended Formal Complaint, dated October 25, 1995, which contained three Causes of Complaint alleging violations of DR 1-102(A)(3), DR 1-102(A)(4), and DR 7-110(B). The complaints all arise from a series of events involving a domestic dispute which began in Maine in 1992, which are related in substantial detail below.

BACKGROUND FACTS

The accused began dating Barbara Rowland (Rowland) in 1989 or 1990. Mrs. Rowland then resided in Yarmouth, Maine, and had custody of the two minor children from her previous marriage. The father of the children, Robert Kingman (Kingman), lived about 50 miles from Yarmouth, and exercised regular visitation with the children, as provided by the divorce decree.

In early 1992, the accused and Rowland decided to marry and move to Oregon, where the accused held a position as a law professor at Lewis and Clark Northwestern School of Law. When Kingman learned of the plans to move to Oregon with the children, he initiated proceedings in Superior Court, Cumberland County, Maine, for modification of the divorce decree regarding the primary residence of the children. The proceeding was entitled Rowland v.

Kingman, No. 89-CV-1047, and both Kingman and Rowland were represented by counsel in that matter.

On June 3, 1992, a Consent Order was signed by Superior Court Judge Cleaves, appointing a Guardian Ad Litem to investigate and report on the issues of custody and primary physical residence, and prohibiting Rowland from permanently removing the children from the State of Maine until the Court ruled on the Kingman motions.

Despite the pendency of the custody/residence matter, the accused and Rowland proceeded with plans to move to Oregon. Rowland closed her medical practice and put her home up for sale. She applied for jobs in Oregon, and looked at schools for the children. Prior to any final ruling, the accused and Rowland purchased airplane tickets for themselves and the children, arranged for movers to pick up the furniture from Rowland's home, and held a going-away party for the children.

A hearing on Kingman's motions was scheduled for August 6, 1992. Judge Beaudoin, to whom the case was assigned that day, was advised that Rowland had already purchased plane tickets for later in August, and that the parties needed to have a decision. He decided to take testimony on the question of whether the children should be allowed to move to Oregon pending a final decision. After hearing testimony from the Guardian Ad Litem, Judge Beaudoin determined that it would not be in the best interests of the children to allow the move to take place if there was a chance that the ultimate decision would require the children to return to Maine. He, therefore, declined to issue an interim

order and arranged his docket to allow two more days of testimony on August 13 and 14, 1992, so that a final order could be issued before August 24, 1992, which was the date of the flight reservations.

The accused was present at the August 6, 1992, proceeding, and understood that Judge Beaudoin was expediting the hearing to avoid the potential for exposing the children to two moves.

Further testimony was heard on August 13 and 14, 1992, and on August 17, 1992, Judge Beaudoin issued an order which stated, in relevant part:

> "If Mrs. Rowland relocates to the state of Oregon, it is in the best interests of Edwin and Meagan Kingman that they primarily reside with Mr. Kingman in Yarmouth, Maine.
>
> "Therefore, it is ORDERED that the divorce judgment dated May 16, 1991 shall be amended to change the primary physical residence of the children to Mr. Kingman if Mrs. Rowland relocates to Oregon, and on condition that Mr. Kingman reside in Yarmouth, Maine. It is further ORDERED that primary physical residence for the children shall remain with Mrs. Rowland if she does not relocate to Oregon, or if Mr. Kingman does not move to Yarmouth as soon as it is reasonable possible after Mrs. Rowland's relocation."

After this order was issued, Rowland fired the attorney who had represented her throughout the proceedings to date. Between August 17th and August 24th, 1992, the accused and Rowland consulted with several other attorneys in Maine regarding the meaning of Judge Beaudoin's order and, specifically, whether it permitted them to move to Oregon pending some further proceeding. The attorneys, none of whom had previously represented Rowland or been involved in the proceedings which preceded issuance of the

August 17th order, gave conflicting advice on this issue. At least one of the attorneys expressed the opinion that unless Kingman had established a residence in Yarmouth, Rowland could move to Oregon with the children without violating the terms of the August 17th order. No attempt was made to seek clarification of any perceived ambiguities from Judge Beaudoin or to discuss the matter with Kingman or his attorneys.

On August 19, 1992, the accused contacted an attorney in Portland, Oregon, to arrange for an appointment for Rowland to discuss the custody matters. An appointment was made for August 26, 1992, in Portland.

On August 22, 1992, Rowland and the accused picked up the children at Kingman's residence, where they had been visiting. Kingman asked Rowland what her intentions were with respect to the move, but Rowland did not disclose that she intended to leave for Oregon with the children as scheduled on August 24th. Instead, she told Kingman that she would stay in Maine if that is what she had to do to retain custody of the children. The Accused was not a party to this conversation, but was told by Rowland that it had occurred soon afterward.

On August 24th, the Accused, Rowland, and the children flew to Oregon without giving any advance notice to Kingman or the court. On August 25th, the Accused telephoned Kingman and told him that the children were now in Oregon, that they expected to stay in Oregon until the "custody thing is finally resolved," and that "this fight is only just started."

On August 26, 1992, the Accused and Rowland met with an attorney in Portland to discuss legal steps to be taken in Oregon to prevent Mr. Kingman from interfering with the Rowland's custody of the children. On the advice of the attorney, a Temporary Protective Order of Restraint was obtained from the Multnomah County Circuit Court, and a copy of that order was hand-delivered to the Lake Oswego Police Department, on August 27, 1992. The choice of Multnomah County rather than Clackamas County, where Rowland and the Accused resided, was apparently made for the convenience of Rowland's attorney, and not for any other reason.

In the meantime, Kingman returned to the court in Maine on August 27, 1992, and obtained an ex parte order for the return of the children to Maine and an order to show cause why Rowland should not be held in contempt for failure to comply with the August 17, 1992, order. Kingman also retained an Oregon attorney, who that same day obtained a Writ of Assistance from Clackamas County Circuit Court Judge Sams. On the evening of August 27th, pursuant to Judge Sams' order, police officers appeared at the Accused's home in Lake Oswego and removed the children, turning them over to Kingman for transport back to Maine.

FIRST CAUSE OF COMPLAINT

For its first cause of complaint, the Bar alleges that the Accused engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of DR 1-102(A)(3), in connection with the move to Oregon. Specifically, the Bar complains that the Accused concealed his intent to move Rowland's children from Maine

to Oregon after Judge Beaudoin's August 17th order, assisted Rowland in her plan to move with the children to Oregon, and failed to disclose to Rowland's new attorneys all of the relevant facts surrounding the issuance of the August 17th order.

The terms "fraud" and "deceit," as used in DR 1-102(A)(3), refer to conduct that would be actionable under Oregon law. In re Hockett, 303 Or 150, 734 P2d 877 (1987). The Bar's evidence did not establish the elements of tortious fraud, deceit, or misrepresentation, which would have required, among other things, a false representation made with intent that the other act upon it. There is no evidence that the Accused was ever asked about his intentions with regard to leaving Maine with Rowland's children, nor can we identify a particular circumstance at which the accused had a duty to correct a known misapprehension by the court, the Guardian Ad Litem, Kingman, or Kingman's attorneys.

The Bar argues that the Accused concealed from Rowland's new attorneys all relevant information about the court's August 17th order. It is apparent that the Accused and Rowland shopped for an attorney who would support their desired interpretation of the August 17th order. However, to the extent that evidence was presented concerning what information those attorneys possessed, it does not establish that any of the attorneys were misled by a failure of the Accused to provide relevant facts. It is also not established that any of the attorneys relied on the Accused to furnish relevant facts, or that he actively undertook to conceal facts or to prevent the attorneys from learning everything relevant

to the matter about which they were being consulted.

The Bar also asserts that by assisting Rowland in moving to Oregon with the children, the Accused engaged in conduct involving dishonesty or misrepresentation. "Dishonesty" and "misrepresentation" are broader concepts than fraud or deceit, and have been held to prohibit a lawyer from assisting a client in conduct which the lawyer knows is fraudulent or illegal. In re Hockett, supra. Nor is it necessary to be acting on behalf of a client in order to violate DR 1-102(A)(3). A lawyer owes a duty to the court and other lawyers to be candid, fair and honest in all of his dealings. In re Hockett, supra; In re Glass, 308 Or 297, 779 P2d 612 (1989).

Judge Beaudoin's order of August 17, 1992, while perhaps not a model of clarity when read in isolation, was nevertheless clear enough to anyone who had participated in the proceedings leading up to its issuance. The Accused argues that it was not unreasonable to interpret the August 17th order as requiring Kingman to first move to Yarmouth as a precondition to any change of permanent residence for the children. This interpretation ignores entirely the whole reason for expediting the hearings; namely, to avoid the harm to the children that would result from being forced to move twice. The Accused acknowledges that the children would have to return to Maine if Kingman moved to Yarmouth, which meant that his proposed construction of the order exposed the children to the exact harm which the hearings had been conducted to prevent.

The most obvious course of action to take if there were genuine doubts about the Judge's intention was to ask the court for clarification. The most probable explanation for the failure to make inquiry of the court is that Rowland and the Accused knew that the order was intended to preclude them from taking the children to Oregon. Furthermore, if the Accused and Rowland believed that their interpretation was reasonable, there would have been no credible reason to conceal their intentions from Kingman, who had not yet moved to Yarmouth, except to ensure that Kingman did not thwart their plans by making arrangements to move to Yarmouth.

The Trial Panel finds, by clear and convincing evidence, that the Accused knew that the order was intended to prohibit an interim move to Oregon, and that the Accused's claim to have relied upon the advice of counsel is not made in good faith. This was the finding of the Maine Superior Court in Rowland's subsequent contempt hearing, and the Trial Panel reaches the same conclusion with respect to the Accused's conduct.

This finding does not, by itself, answer the question of whether the conduct violates DR 1-102(A)(3). The Accused was scheduled to return to Oregon in any event, to resume his duties at the law school. The Accused was not a party to the Maine proceedings, and he did not have an attorney-client relationship with Rowland. We have already declined to find a duty on the Accused's part to communicate with the court or Kingman with respect to his intentions. The Trial Panel is cognizant of the difficulty to the Accused which would be created by an independent

decision by Rowland to intentionally violate the court order. We would not be inclined to find a violation of the Disciplinary Rule if the Accused had merely acquiesced in his wife's decision by carrying the luggage, accompanying her and the children on the airplane, and opening his Oregon home to them.

In this case, it is not necessary for the Trial Panel to identify the limits of DR 1-102(A)(3). The facts presented demonstrate that the Accused's involvement was not merely passive. Rather, it is apparent that he helped her shop for an attorney who would provide a pretext for the move; he set up an appointment with an Oregon attorney for the purpose of placing obstacles to Kingman's predictable response; he telephoned Kingman from Oregon and taunted him by stating that the fight was just beginning. At no time has the Accused described any effort on his part to persuade his wife to seek clarification from the court or to delay the move to Oregon. His subsequent writings and arguments make clear that the Accused continues to fail to acknowledge the wrongness of the course of action that he and Rowland chose to take. In summary, the Accused actively participated in the intentional violation of a court order. Based on these facts, the Trial Panel finds that the Accused intentionally engaged in conduct involving dishonesty, in violation of DR 1-102(A)(3).

SECOND CAUSE OF COMPLAINT

The Bar's Second Cause of Complaint alleges that the Accused engaged in conduct prejudicial to the administration of

justice, in violation of DR 1-102(A)(4). In addition to the conduct described above relating to the Maine proceedings and the move to Oregon, the Bar complains of certain conduct which occurred after the children returned to Maine.

The Bar alleges, and the Accused admits, that the following letters were sent, as described below:

1. On August 28, 1992, the Accused wrote to Judge Beaudoin, to complain of the conduct of Kingman and his attorney in obtaining Judge Cleaves' ex parte order for return of the children to Maine. Copies of the letter were sent to attorneys for Kingman, Rowland, and Judge Cleaves. In the letter, the Accused asks that Kingman's lawyers be removed from the case and investigated for unethical conduct.

2. On August 29, 1992, the Accused again wrote to Judge Beaudoin, before whom the Maine custody matter remained pending, advising him that Kingman did not have a residence in Yarmouth. No copies of this letter were sent to anyone.

3. On August 31, 1992, the Accused sent a letter to Clackamas County Judge Sams, Kingman's Oregon lawyers, and the Lake Oswego Police Department. Copies were sent to Kingman's Maine lawyers, Rowland's lawyers, Judge Cleaves and Judge Beaudoin. In this letter, the Accused asserted that Judge Sams had been without authority or jurisdiction to order the removal of the children, that a hearing should have been held after notice, that the procedure followed was in violation of due process, the Fourth Amendment, professional courtesy and common decency, and asking that a hearing be scheduled and that Kingman be ordered to return the children to Oregon.

4. On November 4, 1992, the Accused wrote to Judge Sams. He stated that he had not yet received a response to the August 31, 1992, letter, or an acknowledgement of its receipt. He asked Judge Sams to place both letters in "the appropriate agency and court files to assure preservation in the eventuality of further court review." No copies of this letter were sent to anyone.

5. On November 9, 1992, the Accused sent letters individually addressed to Judge Sams, Judge Beaudoin, and Judge Cleaves, notifying each of them that the Accused had drafted a complaint alleging civil rights violations

and further advising of his intent to file it. The Accused did not identify the potential defendants to be named. The Accused stated that he was delaying filing of the complaint pending the entry of an order in the custody matter, which was still pending before Judge Beaudoin. He asked each recipient to prepare written reconstructions of events in the case, "to assure accurate recall at the time of any deposition."

The "administration of justice" includes both the procedural functioning of the court or proceeding and the substantive interest of parties to a proceeding. Prejudice, or harm, to the administration of justice can occur from repeated conduct or from a single act which causes substantial harm. In re Haws, 310 Or 741, 801 P2d 818 (1991).

With respect to the Accused's behavior in connection with the move to Oregon, his participation in the intentional violation of Judge Beaudoin's order of August 19, 1992, resulted in expensive and protracted proceedings in Maine and Oregon, including contempt proceedings and police action. This placed additional, unnecessary burdens on the administration of justice which are amply documented in the partial transcripts and court records which were introduced in evidence. The Trial Panel concludes that the conduct described under the discussion of the Bar's First Cause of Complaint also constitutes conduct prejudicial to the administration of justice, in violation of DR 1-102(A)(4).

In regard to the letters described above, the Bar alleges that the Accused violated DR 1-102(A)(4) by "corresponding with various judges in a threatening manner for the purposes of influencing judicial action." At the time of sending the letters

to Judge Sams, there was no action pending in Clackamas County, and we have heard no evidence to suggest that further proceedings were likely or contemplated in that court. Judge Sams testified that he interpreted the letters as containing a veiled threat, and that he felt the matter should have been raised through appropriate pleadings, appeals, requests for reconsideration, or other open-court procedure.

The Trial Panel agrees that the proper means to raise issues with a court's ruling is to file an appropriate pleading. However, because there was no matter pending before Judge Sams, the Trial Panel is unable to conclude that the letters to Judge Sams were intended to influence judicial action or that they interfered with the administration of justice to the degree required to find a violation of DR 1-102(A)(4). For this reason, the Trial Panel is also not prepared to find that sending a letter to a potential defendant, advising that person of the likelihood of a lawsuit, violates the Disciplinary Rules under the facts of this case.

The letters to Judge Beaudoin and Judge Cleaves are another matter. The Accused knew that those Judges continued to exercise jurisdiction in the pending domestic relations case involving Rowland and Kingman, and that specific matters remained under advisement. The Accused's letters, particularly the one dated November 9, 1992, state that judicial actions, including those yet to be taken, in the pending case will be the subject of inquiry in a federal civil rights action. Although the letter does not identify the defendants, it is not surprising that Judges

Cleaves and Beaudoin, as the individuals responsible for the actions about which the Accused complained, would be the intended targets of the suit.

In sending the letters to the Maine judges, the Accused could not have failed to recognize that his letters would be viewed as attempts to intimidate the court. Judge Cleaves testified that the correspondence from the Accused created a threat to the integrity of the pending proceedings. He also stated that, while he not infrequently receives letters from disgruntled spouses in domestic relations matters, he considered such contact from a lawyer to be more disruptive because of the greater ability of a lawyer to carry out the threat to bring a lawsuit.

Judge Beaudoin also testified that he had matters under advisement in the custody proceeding when the letters were received, and that he viewed the November 9, 1992, as a threat to file a federal lawsuit. He stated that he was not intimidated, however, and that he did not believe there was any legal basis for suit against him.

The Accused argues that the letters were not intended to influence judicial action, that the letters of November 9, 1992, were merely requests to preserve evidence for a possible suit against someone other than the judges, and that the correspondence should not have been interpreted by the judges as threatening. He also observes that he was not a party or attorney for any party, and contends that he had a constitutional right to express his views on the propriety of the judges' conduct. The Trial Panel

finds that the Accused is not credible on this issue.

It is clear that the Accused was in a highly emotional state after the events of August 27th, and that he was actively involved at all times with the conduct of the custody matter after that date. The August 28, 1992, letter to Judge Beaudoin was an open disparagement of Kingman and his attorneys and a challenge to the legality of the previous court order, the only possible purpose of which was to influence the outcome of the proceeding to be held upon Rowland's return to Maine. Likewise, the August 29th letter to Judge Beaudoin, copies of which were not sent to anyone, was intended to discredit Kingman. As noted above, the Accused could not have been surprised at the reaction of the judges to the November 9th letters.

The question is: does the sending of the letters constitute conduct prejudicial to the administration of justice? In considering this question, the Trial Panel has taken into consideration the fact that a non-lawyer may well be excused for conduct which would result in discipline when committed by a lawyer. A lay person writing to a judge to complain about a ruling does not evoke the same consternation for the administration of justice as an ex parte or threatening missive from an attorney connected with a pending proceeding. It is not unreasonable to expect a lawyer to be aware of the various methods and procedures available for obtaining a hearing, for the proper introduction of evidence, and for seeking reconsideration or appeal. It is also reasonable to expect a lawyer to be aware of the effect that

divergence from usual practice and procedure will have on judges and other lawyers.

The Oregon Supreme Court has held that writing letters to potential witnesses improperly threatening litigation is conduct prejudicial to the administration of justice. In re Smith, 316 Or 55, 848 P2d 612 (1993). The fact that the judges in this case were ultimately not influenced by the letters is not relevant, because the potential for substantial prejudice was created by the conduct. In re Boothe, 303 Or 643, 740 P2d 785 (1987) (*unsuccessful attempt to persuade a witness not to testify*). Prejudice resulted from the distraction and alarm caused by the letters, and the potential existed for further substantial prejudice to the integrity of the pending matters due to improper out-of-court communications with the judge before whom the matter was pending. The Trial Panel notes as well that the prejudice resulted from repeated conduct, as the Accused sent at least three letters to Judges Cleaves and Beaudoin.

Based on this analysis, the Trial Panel finds that the Accused violated DR 1-102(A)(4) by writing to Judge Cleaves and Judge Beaudoin.

THIRD CAUSE OF COMPLAINT

The Bar's Third Cause of Complaint is that one or more of the letters described above constituted improper ex parte communications with a judge, in violation of DR 7-110(B).

DR 7-110(B) states:

* * *

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if the party is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if the adverse party is not represented by counsel.

(4) As otherwise authorized by law or Section A(4) of Canon 3 of the Code of Judicial Conduct.

The Trial Panel has already observed that there were no proceedings pending before Judge Sams at the time of the communications in question. Therefore, by the plain language of the rule, no violation of DR 7-110(B) was involved with respect to the letters to Judge Sams.

A copy of the August 28, 1992, letter to Judge Beaudoin was sent to Kingman's lawyers, as well as Rowland's lawyers. Accordingly, DR 7-110(B) was not violated by that communication.

On August 29, 1992, the Accused wrote to Judge Beaudoin without sending copies to anyone. This letter, which referred to Kingman's residence in Yarmouth, plainly concerned the merits of the matter which was pending before Judge Beaudoin.

The November 9, 1992, letters to Judge Beaudoin and Judge Cleaves were identical to those sent to Kingman's lawyers. However, each letter was individually addressed to the recipient,

so Kingman's lawyers had no way of knowing that the letter had been sent to the court. That letter referred specifically to the matter under advisement, and may also have influenced the outcome of matters yet to be addressed, and therefore is considered by the Trial Panel to be a communication on the merits. See In re Burrows, 291 Or 135, 629 P2d 820 (1981) and In re Smith, 295 Or 755, 670 P2d 1018 (1983).

To violate DR 7-110(B), it is not necessary for an attorney to be representing a party to an adversary proceeding. See Legal Ethics Opinion 1991-84. On its face, the rule says nothing about the relationship of the attorney making an ex parte contact to any other party to the proceeding. The purpose of DR 7-110(B) is "to prevent the effect or appearance of granting undue advantage to one party." In re Smith, supra at p. 755. This purpose is not served if officers of the court are allowed to attempt to influence the outcome of a pending proceeding.

Based on the above, the Trial Panel finds that the Accused violated DR 7-110(B), by communicating with Judge Beaudoin on August 29, 1992, and with Judges Cleaves and Beaudoin on November 9, 1992.

SANCTIONS

In determining the appropriate sanction to be imposed, the Trial Panel has considered a number of factors. Perhaps primary among them was the fact that the Accused was obviously personally and emotionally involved with the domestic relations matters. His conduct, while not excusable, must be understood in

the context of the underlying custody dispute and the profound effect that dispute was bound to have on the Accused's personal life. The disappointment that the Accused and Rowland must have felt after the August 17, 1992, ruling is easily understood.

Concerning his conduct after the move to Oregon, the Accused now recognizes that the letters he wrote after the police carried out the Writ of Assistance at the Accused's home on August 27, 1992, were intemperate and a mistake.

The Trial Panel notes that the Accused did not act in his professional capacity as a lawyer on behalf of a client during this matter. No complaints of unethical conduct in regard to the Accused's professional life have been brought to our attention. The Accused is employed full time as a professor, and is not actively engaged in the practice of law at this time, except for occasional pro bono or public interest work. Due to the limited practice and the personal nature of the conduct at issue, the Trial Panel does not believe that the Accused presents any danger to the public, nor is he likely to repeat the conduct.

Based on these factors, and the applicable ABA standards, the Trial Panel concludes that the appropriate sanction to be imposed in this matter is a public reprimand.

DATED THIS 26th DAY OF January, 1996.

Andrew Kerr, Trial Panel Chair

Todd A. Bradley

Wilbert Randle, Jr.