PUBLIC REPRIMAND NO. 2001-18

IN RE: ANDREW M. HOCHBERG

Order (public reprimand) entered by the Board October 12, 2001.

SUMMARY[1]

On February 15, 1997, while operating a snowmobile, the respondent's client collided with an automobile on a public road. The client was cited for unlawful operation of the snowmobile on a public way. The respondent represented the client in defense of a criminal case arising from the accident. In June 1997, at the recommendation of the respondent, the client admitted to sufficient facts and the matter was continued without a finding for six months.

On July 7, 1998 the respondent filed a small claims action against the client for unpaid legal fees in connection with the criminal case described above. In January 1999, the matter went before a mediator and was subsequently discussed that same day with a clerk magistrate.

At the mediation session and in the discussion with the clerk magistrate, the client defended the respondent's small claims complaint on the basis that the respondent was in possession of exonerating evidence but refused or failed to go to trial and present the evidence that he had. Specifically, the client stated that he had found witnesses who would say that the automobile that he hit did not have its lights on at the time of the accident.

The respondent argued to the mediator and the clerk magistrate that he had investigated what the witnesses observed and what they would testify to, if called. Based on this investigation, the respondent claimed to have reason to believe that two of the witnesses were not percipient witnesses and that the third witness's evidence was a fabrication orchestrated by the client. The respondent added that he could not ethically call the third witness to testify, knowing that the witness was likely to lie.

The matter was then rescheduled for trial. On March 3, 1999, the respondent obtained a default judgment against the client in the small claims matter for his entire fee and costs. The client did not appeal or ask for reconsideration.

On September 18, 2000, a husband and wife met with the respondent. Before consulting the respondent, the couple had received a 93A demand letter dated June 15, 2000 and, after the statutory period for response to the demand letter had expired, had been served with a civil complaint for damages relating to the same claim. The demand and the civil claim were being pursued by the respondent's former client in the small claims case, who continued to be indebted to the respondent for unpaid legal services. In his demand and civil complaint, the former client alleged that on May 21, 1998, he had been a tenant of certain real estate owned by the couple's nominee trust and was injured when attempting to fix a faulty roof that had been neglected.

On September 20, 2000, the respondent replied to the 93A claim by letter to the former client's current attorney. In his correspondence, the respondent disclosed that his firm had a small claims judgment for attorney's fees against the former client in connection with a criminal complaint. The letter went on to add that "the investigation of the criminal complaint indicated that [the former client] tried to fabricate evidence and use that evidence

in his defense of the criminal action." The respondent then set forth the couple's defense to the merits of the 93A claim.

The fact of the small claims judgment, and the information that the former client may have tried to fabricate evidence in defense of the criminal matter pending against him, remained confidential within the meaning of Mass. R. Prof. C. 1.6(a) and the comments thereto. The purpose of the respondent's disclosure of confidential information was to cast doubt on the credibility of his former client. However, the confidential information was disclosed only to the former client's current attorney.

The respondent's disclosure of embarrassing and potentially detrimental information concerning a former client to the disadvantage of his former client and to the advantage of his current clients, as described above, was in violation of Mass. R. Prof. C. 1.9(c)(1) and Mass. R. Prof. C. 1.6(a). In mitigation, the respondent's conduct reflected misunderstanding of the requirements of the disciplinary rules.

This matter came before the Board on a stipulation of facts and disciplinary violations and a joint recommendation for discipline by public reprimand. On September 10, 2001 the Board of Bar Overseers voted to adopt the parties' stipulation and proposed sanction. On October 12, 2001, the respondent received a public reprimand.

[1] Compiled by the Board of Bar Overseers based on the record of proceedings before the Board.