

BOARD OF OVERSEERS OF
THE BAR

Petitioner-Appellant,

v.

ORDER

GENE R. LIBBY,

Respondent-Appellee

The Board of Bar Overseers has appealed from a February 7, 2019 decision by a panel of the Grievance Commission. The panel found that Attorney Gene Libby had not been proven to have engaged in misconduct subject to sanction under the Maine Rules of Professional Conduct and therefore dismissed the disciplinary proceeding against Attorney Libby.

The disciplinary charges against Libby arose out of a divorce case in which Attorney Libby had advised his client to transfer funds from a savings account held jointly with her estranged husband into a personal checking account.

Procedural History

This proceeding began with a bar complaint filed against Attorney Libby on May 10, 2017 by Jeffrey Bennett, Esq., who was the opposing counsel in *Deutsch v. Deutsch*, PORDC-FM-16-457.

After the *Deutsch* divorce was concluded and after review by a panel of the Grievance Commission, Bar Counsel filed a petition on behalf of the Board of Overseers setting forth formal charges pursuant to M. Bar. R. 13(e) on August 20, 2018.

The petition alleged that Libby had violated various provisions of the Rules of Professional Conduct. The primary charge was based on Rule 3.4(c), which provides that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal,” and specifically involved the contention that the transfer by Libby’s client violated the preliminary injunction issued at the outset of all divorce cases pursuant to 19-A M.R.S. § 903(1)(B)(1).

The petition also alleged that Libby had violated the following additional rules:

- Rule 1.7(a)(2), which applies to conflicts of interest;
- Rule 3.3(b), which relates to a lawyer’s obligation to take remedial measures if the lawyer knows that a person is engaging in criminal or fraudulent conduct; and
- Rules 8.4(a), (c), and (d), which declare that it is professional misconduct for a lawyer to violate provisions of the Rules of Professional Conduct, to engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or to engage in conduct that is prejudicial to the administration of justice.

Libby filed an answer to the petition, and pursuant to M. Bar R. 13(e)(4) and 13(e)(7) a hearing was held on December 17, 2018 before a three-member panel of the Grievance Commission. The panel heard from three witnesses: Attorney Bennett as the complainant, Libby as the respondent, and Attorney Kristin Gustafson, who was called as an expert witness on Libby’s behalf. In a written closing argument submitted after the hearing, Bar Counsel raised an additional claim that Libby had billed his client for unreasonable fees in violation of M. R. Prof. Conduct 1.5(a).

The Grievance Commission panel issued its decision on February 8, 2019. Bar Counsel thereafter filed a petition for review of that decision by a Single Justice pursuant to M. Bar R. 13(f)(1). Libby did not file a motion for a trial of the facts pursuant to M. Bar R. 13(f)(3), and the parties thereafter filed briefs and appeared for oral argument on December 2, 2019.

M. Bar R. 13(f)(4) provides that the Single Justice’s review shall be based on the record of proceedings before the Grievance Commission panel and that the panel’s findings of fact shall not be set aside unless clearly erroneous.

Panel Decision and Issues on Appeal

The two major issues raised before the panel and raised in the pending petition for review are whether the action taken by Libby’s client, Ann-Charlott Deutsch (referred to in the record and in this order as Anna), constituted a transfer in violation of the preliminary injunction and if so, whether that transfer was for “necessities of life.”

19-A M.R.S. § 903(1)(B)(1) provides that a preliminary injunction in every divorce case enjoins both parties

from transferring, encumbering, concealing, selling or otherwise disposing of the property of either or both of the parties, except in the usual course of business or for the necessities of life, without the written consent of the parties or the permission of the court.

In this case that injunction applied to Anna from the outset of the case in May 2016 and to her husband, Robert Deutsch (Robert), once the divorce summons was served upon him.

The Grievance Commission panel ultimately did not determine whether Anna’s transfer of funds from a joint savings account to her personal checking account was a “transfer” for purposes of the preliminary injunction. Grievance Commission Panel Findings and Order filed February 8, 2019 (hereafter Panel Findings) at 5. Instead, it assumed “without deciding” that Anna’s action constituted such a transfer. *Id.* It went on to find, however, that the transfer was to enable Anna to pay for necessities of life in the form of her legal fees and therefore that Libby’s advice did not constitute knowing disobedience of a court order in violation of Rule 3.4(b) . *Id.* at 7.

The Grievance Commission panel also disagreed that Libby had violated Rule 1.7(a)(2). The panel did not expressly address the alleged violations of Rules 3.3(b) or 8.4 but implicitly rejected those allegations in concluding “that the Board has not proven by a preponderance of the evidence that Attorney Libby has engaged in misconduct subject to sanction under the Maine Rules of Professional Conduct.” Panel Findings at 11. The panel declined to consider the Board’s contention that Libby had violated Rule 1.5 because that had been raised for the first time in Bar Counsel’s closing argument after the hearing. Panel Findings at 10.

On this appeal the Board contends that the decision of the panel was erroneous because attorney’s fees do not qualify as necessities of life and in the alternative that the panel’s finding that the transfer here was for a necessity of life was clearly erroneous. The Board also contends that the panel should have addressed alleged violations of Rules 1.7(a)(2), 8.4(d), and 1.5 and found those violations to have been proven.¹ Respondent disagrees on all points and also argues that the panel’s decision can be affirmed on the alternative ground, not reached by the panel, that Anna’s withdrawal did not constitute a transfer for purposes of the injunction.

Record Evidence

The evidence before the panel was that the divorce in this case involved a marital estate in excess of \$ 2,000,000.² Libby testified that he had reached an agreement at the beginning of the

¹ At oral argument Bar Counsel stated that the Board was not seeking a remand to the panel on any issues. The Board also acknowledged in its reply brief that it was no longer pursuing an alleged violation of Rule 3.3(b). Board’s Rebuttal Brief at 12. As far as the court can tell, the Board has not formally withdrawn its contention that Libby violated Rule 8.4(c) but it has not pointed to any evidence of dishonesty, fraud, deceit, or misrepresentation. Indeed, the Board bases much of its argument on Libby’s statements acknowledging that he advised his client that she should withdraw the funds in question.

² Exhibit B to the Stipulated Divorce Judgment ultimately entered on January 2, 2018 (Board Ex. 15) listed the value of the marital estate at \$ 2,211,120.89.

case with Robert's first attorney, Robert Mittel, that Anna's expenses during the divorce proceeding would be paid out of a joint checking account which Robert would fund periodically.³ For that reason, although he had filed a motion for an order of support pending divorce (referred to in the record as a "motion pending"), Libby did not initially pursue that motion.

The panel found that at a certain point Robert stopped making deposits to the joint checking account, which Anna had been using to pay her legal fees and other living expenses. Panel Findings at 6. The evidence supported that finding. Libby testified that ATM withdrawals by his client had been declined on a number of occasions, and Robert testified at his deposition that he had received notices that Anna had bounced multiple checks. Respondent's Ex. 4 (R. Deutsch Dep. 33). Among the checks that were bounced was a check to Libby's firm for attorney's fees.⁴

After unsuccessfully trying to reach some agreement with Attorney Bennett to obtain a preliminary agreement on distribution of assets or for payment of Anna's attorney's fees, Libby requested that the court hold a hearing on his previously filed motion pending. Board Ex. 23. The court did not set a hearing but scheduled a telephonic conference with a magistrate on March 23, 2017. The conference record states that at that conference the magistrate scheduled a further conference for April 24 to see if the parties could reach agreement on interim attorney's fees and

³ The initial case management order dated July 22, 2016 (Ex. C to Board Ex. 6) does not specifically refer to the agreement but includes a cryptic marginal notation of "joint checkbook." The existence of the agreement was disputed by Bennett, who had replaced Mittel as Robert's attorney at some point before February 2017. However, Robert testified at his deposition on March 9, 2017 that he had been keeping up payments in the account and adding money as needed "until recently." R. Deutsch Dep. 32 (Respondent's Ex. 4).

⁴ The reason why Robert stopped making regular deposits in the account was disputed. Robert testified that he had not known the account was low and thought Anna could use money she would receive from trading in an Audi automobile. He said he would pay Anna's expenses but specifically did not agree that those could include her attorney's fees. R. Deutsch Dep. 32-34 (Respondent's Ex. 4). Libby testified that he believed that the cessation of deposits was a tactic instigated by Attorney Bennett to pressure Anna by depriving her of funds, including funds needed to litigate the divorce, to cause her to accept a lower settlement. The Panel made no findings on that issue.

if by then no agreement had been reached, the court would schedule a hearing. Exhibit B to Board Ex. 3.

In the conference order, the Magistrate stated that the court hoped that the parties would choose not to incur attorney's fees in litigating how attorney's fees would be paid and added, "Parties have substantial marital assets that could be used to pay [attorney's fees]; however, at present, parties cannot agree." *Id.*

At that point, without agreement from counsel for Robert and with the prospect that a court hearing would not be scheduled until an unspecified time in the future, Libby advised his client that she could transfer funds from a joint savings account at Bath Savings to a checking account that she maintained at the same institution in order to pay her legal fees and personal expenses. As the Grievance Commission panel found, Anna was at that time financially insecure because her husband controlled most of the marital finances and had stopped making payments to her. Panel Findings at 5. In addition, as Robert acknowledged in his deposition, the money that Anna withdrew from the joint savings account originally came from Anna's real estate commission earnings. R. Deutsch Dep. 69 (Respondent's Ex. 4).

Throughout all of this period Robert was paying his own attorney's fees from his business account, to which Anna did not have access and which at all times had a balance exceeding \$200,000. R. Deutsch Dep. 35 (Respondent's Ex.4); Respondent's Ex. 11.

Anna withdrew \$77,000 from the joint savings account on March 24, 2017. The transfer was performed without the permission of her husband or the court. It was disclosed to Attorney Bennett at Anna's deposition 10 days later.

That led to a motion for contempt filed by Attorney Bennett on behalf of Robert and to the bar complaint that is the subject of this proceeding. In the divorce case the transfer also resulted in further motion practice, including a motion filed by Bennett to compel testimony from Libby.

The only motion that was acted on by the District Court was the motion to compel testimony from Libby, which was denied on July 24, 2017. All the remaining motions remained pending until they were dismissed as moot after the stipulated divorce judgment was filed on January 2, 2018. *See* Board Ex. 14.

The stipulated divorce judgment split the marital estate in half, awarding property valued at \$1,105,560 to each spouse. Anna received spousal support of \$5,000 for five years, subject to modification pursuant to 19-A M.R.S. § 951-A(4). The checking account into which Anna had deposited the money she withdrew from the joint savings account was awarded to her as part of her marital share. Board Ex.15.

Violation of Preliminary Injunction

A threshold issue is whether Anna’s withdrawal of funds from the joint savings account was a transfer for purposes of the preliminary injunction.

The Board’s position is that 19-A M.R.S. § 903(1)(B)(1) unambiguously prohibits all transfers and would therefore apply to Anna Deutsch’s withdrawal in this case – unless it came within the exception for necessities of life (which the Board also disputes). The Board also points out that 19-A M.R.S. § 903(2)(A) allows a party to move on seven days’ notice for modification of the injunction and further provides that the district court shall proceed to hear the motion “as expeditiously as justice requires.” In addition, 19-A M.R.S. § 105(1) and (2) provide that courts

may, after hearing, order a party in any case under Title 19-A to pay another party's reasonable attorney's fees.

In response, Libby argues that a "transfer" for purposes of the preliminary injunction should be interpreted to mean a transfer that removes property from the jurisdiction of the divorce court – because transferred property that remains part of the marital estate can be appropriately accounted for in the final divorce judgment. When property is transferred to a third party and ceases to be subject to the divorce court's jurisdiction, the court may not be able to equitably divide the marital assets – the situation presented in *King v. King*, 2013 ME 56 ¶ 21, 66 A.3d 593. Libby argues that in contrast, as long as assets remain within the marital estate – as they did in this case – the court can take any transfers into account and treat them, for example, as an advance distribution against the party's share of the marital estate.

In support of Libby's position Libby's expert witness, Attorney Gustafson, testified that Anna's withdrawal in this case did not violate the preliminary injunction because it did not remove assets from the marital estate and the divorce court's jurisdiction. December 17, 2018 Hearing Transcript ("Tr.") 145, 150-51.⁵ She testified that asset transfers are common so long as they remain within the marital estate and that there is an expectation and practice that, if there are sufficient assets, both parties' attorney's fees will be paid during the pendency of the case. Tr. 148, 153-54.

Ultimately, Gustafson testified, if one party has obtained marital assets while the divorce was pending, that would be taken into account by the court in fashioning the eventual distribution of property in the divorce decree. Tr. 151, 163-65. Gustafson also stated that if there was a transfer

⁵ Although the panel did not decide whether Anna's withdrawal was a transfer for purposes of the preliminary injunction, it quoted Gustafson's testimony on that issue. Panel Findings at 7, quoting Tr. 150-51.

of assets that left one of the parties without any funds which could be accessed, the divorce court could provide relief even though the transfer would not violate the preliminary injunction. Tr. 196-97.

Gustafson bolstered her opinion by what she described as the practical reality that hearings on motions for attorney's fees in a case such as the Deutsch divorce are not likely to be scheduled promptly because District Courts handling family matters are too busy with higher priority cases. Tr. 158-60, 192. The panel approvingly noted Gustafson's testimony on this point. Panel Findings at 8. Gustafson specifically testified that parties in divorce cases never actually get hearings on seven days notice pursuant to section 903(2)(A). Tr. 187-88.

The court has looked for but has not found any persuasive Maine authority on whether "transfers" within the meaning of 19-A M.R.S. § 903(1)(B)(1) apply to any transfer or only to transfers that remove assets from the court's jurisdiction.

Bar Counsel cites to the Stipulated Report of Findings and Order in *Board of Bar Overseers v. Van Dyke*, GCF No. 14-476 (Oct. 2, 2015).⁶ As the panel concluded, however, the *Van Dyke* case is distinguishable for several reasons. First, the transfer in that case by Van Dyke's client was into an account to which her mother had access, which meant it potentially involved a transfer of property outside of the jurisdiction of the divorce court. Van Dyke's client had also failed to limit her spending from that account to the necessities of life. Perhaps most importantly, Van Dyke's client also failed to disclose the existence of the account to which she had transferred the funds in question, and she falsely responded under oath to an interrogatory that requested her to identify

⁶ A copy of the *Van Dyke* order is contained in the record as Exhibit C to Board Ex. 3.

any accounts that she possessed jointly with any other persons. The answers to interrogatories, including the falsehood, had been submitted to opposing counsel by Van Dyke's office.⁷

In this case, as noted by the panel, Anna's withdrawal did not remove the funds from the marital estate or the divorce court's jurisdiction, she disclosed the transfer, her spending from that account did not involve any economic misconduct, and neither she nor Attorney Libby were parties to any sworn or unsworn falsehoods. Panel Findings at 5.

The *Van Dyke* case is also distinguishable because it was a stipulated report rather than a decision reached after litigation. In exchange for a reprimand, which might have been deserved solely based on his client's false answer to the interrogatory, Van Dyke did not litigate the issue of whether and to what extent his client's transfer fell afoul of the preliminary injunction.

The court ultimately concludes that "transfer" cannot be interpreted as literally as the Board suggests for several reasons. First, if the Board is correct – and as Bar Counsel conceded at oral argument – Robert's payment of his own attorney's fees from his business account would also constitute a transfer of "the property of either or both of the parties." There is no question that Robert's business account was marital property. It makes no sense for Robert to be able to pay his attorney's fees from an account to which Anna had no access while allowing him to restrict Anna from paying her attorney's fees and prohibiting her from transferring funds in order to be able to pay those fees.

Second, the court is persuaded by the policy arguments advanced on Libby's behalf and set forth in the expert testimony of Kristin Gustafson, which the Board did not controvert. If the family courts in Maine are overburdened with higher priority cases involving minor children so

⁷ Although Van Dyke stated that he had left the preparation of the answers to interrogatories to his secretary, he acknowledged that, as counsel, he was responsible for those answers.

that hearings in low priority cases will be delayed or combined with the final hearing on the merits, it is not appropriate to give lawyers a choice between waiting for hearings that are only theoretically available or facing bar proceedings. In addition, if the Board's interpretation were to prevail, the likely consequence would be to inflict an increased number of demands for prompt hearings on family courts that do not have the resources to satisfy those demands.

One of the major difficulties with the Board's position on this appeal is that it appears to endorse a situation where Anna's spouse is free to pay his legal fees and personal expenses from his business account while subjecting Attorney Libby to potential discipline for advising his client to transfer funds so that she could do likewise. Even if the Board's position – that the appropriate action would have been to wait for a hearing so that the court could decide whether to provide relief – might make sense in an ideal world, lawyers do not practice in an ideal world.

The court acknowledges that there are countervailing arguments. If transfers from jointly held accounts to accounts to which only one spouse has access are not covered by the preliminary injunction, then – in a case where all the financial assets are jointly held– one party could transfer all of the assets to an individual account and leave the other spouse with virtually nothing while the divorce was pending. At oral argument Bar Counsel therefore argued that the preliminary injunction is designed to prevent transfers that disadvantage the other spouse, not just transfers that remove assets from the court's jurisdiction.

The specific transfer at issue in this case, however, did not disadvantage Robert in any way. At all times he had more than enough in his business account to pay his personal expenses and his attorney's fees and even to visit his daughter in Hawaii. Moreover, it is not necessary to apply the preliminary injunction to transfers within the marital estate in order to protect truly disadvantaged parties. If one party transfers assets in a manner that deprives the other spouse of any access to

funds for living expenses or legal expenses during the divorce proceeding, judicial relief would be available in the form of an interim order of support under 19-A M.R.S. § 904(2). Otherwise the court can account for any transfers within the marital estate in fashioning the final property distribution in the divorce decree.

Accordingly, the decision of the Grievance Commission Panel that Attorney Libby did not advise his client to disobey an obligation of the rules of the divorce proceeding is affirmed on the alternative ground that the withdrawal of funds by his client did not, under the circumstances of this case, constitute a prohibited transfer for purposes of the preliminary injunction.

Necessities of Life

The Grievance Commission panel ruled that, “assuming without deciding” that Anna’s withdrawal constituted a transfer for purposes of the preliminary injunction, the withdrawal was to enable her to pay for her legal fees, which it found under the circumstances qualified as “necessities of life.” Panel Findings at 7. That finding was also supported by Kristin Gustafson’s testimony – that in a divorce case involving substantial assets the retention of attorneys is essential. Tr. 191-92, 198-99. The Board argues that Anna could have waited until the end of the case to pay Libby, but the panel found that was unreasonable. Panel Findings at 9-10. Moreover, there was evidence that legal fees in a case of this nature would potentially include the retention of experts, whose fees must be paid before the case is concluded. Tr. 162-63, 218-220.

There is no Maine authority delineating the parameters of what constitute necessities of life. The court agrees with the panel decision that this is an issue to be determined on a case-by-case basis. Accordingly, although the court does not necessarily agree with some of the rhetorical

flourishes in the panel’s discussion of necessities of life,⁸ it agrees that necessities of life have to be judged in the specific context of the case in question. The panel’s decision that Anna’s withdrawal of funds enabled Anna to pay for necessities of life in this case was not clearly erroneous.

The Board argues that the panel’s decision that attorney’s fees are a necessity of life is incorrect as a matter of law and that the remedy for a party who does not have money to pay legal fees is to seek court approval by means of a motion for attorney’s fees pursuant to 19-A M.R.S. § 105.⁹ The only authority that the Board cites in support of this argument is from an intermediate appellate court in Arizona. *Little v. Superior Court*, 884 P.2d 214, 215-16 (Ariz. Ct. of Appeals, Div. One, Dept. C). The court does not find that case to be persuasive.¹⁰ Even in cases without minor children, navigating the legal waters of divorce proceedings is an exercise that is likely to have significant financial consequences for the parties. At least in a case where the assets are not insubstantial and the other spouse is represented, having a lawyer is sufficiently important to qualify as a necessity.

The Board argues that the statutory scheme makes the court, rather than individual parties, the appropriate decisionmaker with respect to payment of counsel fees. However, the court’s understanding is consistent with Kristin Gustafson’s testimony that attorney’s fees are routinely paid by parties in divorce cases without either court approval or the consent of the opposing party. Tr. 199. Accepting the Board’s interpretation would mean that – in the absence of agreement –

⁸ See Panel Findings at 5-6.

⁹ Section 105 replaced section 904(1) in 2005, which resulted in some confusion at oral argument because section 905(1), although repealed in 2005, remains in vestigial form on the website of the Revisor of Statutes.

¹⁰ The *Little* decision is also distinguishable because that case involved fairly egregious facts.

both spouses would need a court hearing before their attorney's fees could be paid. This would place an additional and unnecessary burden on the family courts.

In the context of family cases in Maine, the Board's argument ignores the practical reality outlined by Gustafson that notwithstanding the statutory availability of an order pending divorce or a hearing on attorney's fees, it is frequently not possible – as the record demonstrates in this case – to obtain a prompt hearing on such a motion in a case which does not qualify as a priority and because the divorce court believes – as the Magistrate stated in this case – that there are sufficient assets so that the parties should be able to agree on attorney's fees. *See* Exhibit B to Board Ex. 3. The panel specifically credited Gustafson's testimony that it is impractical to assume that a hearing on attorney's fees could be obtained in any reasonable time frame given the limited availability of hearing time in the family court. Panel Findings at 8.

The Board's second argument is that, under the circumstances of this case, the panel's finding that Attorney Libby counseled his client to withdraw funds from the joint savings account because she was financially insecure and needed to pay her legal fees and other personal expenses was clearly erroneous. The panel could perhaps have found, as the Board argues, that Libby's advice was based in part on a retaliatory motive.¹¹ However, the panel was not compelled to find against Libby on that issue.

¹¹ The Board points out that when she made the withdrawal Anna had in excess of \$30,000 in her personal account from which it argues that she could have paid legal fees and other personal expenses. However, that sum included \$20,000 that she had received from trading in her Audi, and there is evidence that she needed to replace that vehicle. There is also evidence that she in fact used \$20,000 to purchase a used BMW in May. At that point, without the money involved in the disputed transfer, her personal account would have been reduced to around \$7,000. *See* Attachment to Board Ex. 19 (Anna Deutsch account for May 8, 2017).

The Board also argues that Anna withdrew more than she needed for necessities of life, but the panel was entitled to conclude that the amount withdrawn was intended to constitute a reserve for future legal and personal expenses. Notably, the panel found that there was no evidence that Anna did not limit her actual spending to necessities of life, Panel Findings at 5, and except for its disagreement about her payment of attorney's fees the Board does not dispute that Anna's spending was reasonable.

The Board had the burden of proof, and determining the weight and credibility of the evidence and testimony was the province of the panel as the trier of fact. There was sufficient evidence to support the panel’s determination that, in a divorce with a marital estate exceeding \$2 million, Anna became anxiety ridden and financially insecure when Richard began limiting payments to the joint checking account and that Libby, knowing that a court hearing would not occur until an unspecified time in the future, advised her to transfer funds so that she could pay her legal and personal expenses without having her checks bounce and her ATM card declined. The court does not find that determination to be clearly erroneous.¹²

Finally, for a violation of Rule 3.4(c) to be found, a lawyer must “knowingly” disobey an obligation under the rules of a tribunal. The panel decision validated Libby’s understanding that Anna’s withdrawal was permissible to pay for necessities of life. It follows that Libby did not knowingly disobey a rule of the divorce tribunal.

Accordingly, the court affirms the panel’s finding that Attorney Libby did not knowingly disobey a rule of the tribunal in violation of M.R. Prof. Conduct 3.4(c) because his advice was intended to allow Anna to pay for necessities of life.

Other Alleged Violations

The remaining issues concern the Board’s disagreement with the panel’s decision that Rule 1.7(a)(2) had not been violated, with the panel’s implicit rejection of the Board’s arguments that

¹² See. e.g., *Wells v. Powers*, 2005 ME 62 ¶ 2, 873 A.2d 361 (a finding of fact is clearly erroneous only when there is no competent evidence to support it, when the fact finder clearly misapprehends the meaning of the evidence, or when the force and effect of the evidence, taken as a whole, rationally persuades the appellate court “to a certainty” that the finding is so against the great preponderance of the evidence that it does not represent the truth and right of the case)

Libby violated Rule 8.4(d), and with the panel's decision not to consider the Board's late-raised claim that Libby had violated Rule 1.5.

1. Rule 1.7(a)(2) – Conflict of Interest

On this issue the Board renews its argument that because Libby's advice to Anna was designed in part to allow her to pay his fees, his advice constituted a conflict of interest. The problem with this argument is that, while the Board sees this case as one where Libby circumvented a court ruling in order to have his fees paid,¹³ the panel instead determined that Libby recognized that he was not going to obtain a timely court ruling and that instead of waiting for such a hearing his client was entitled to withdraw funds to avoid financial insecurity and be able to pay legal expenses pending final resolution of the case. In light of the panel's finding, there was no conflict between Libby's interests and those of his client because they had a common interest in alleviating her financial insecurity and in allowing her to continue paying her personal and legal expenses – including any experts who might potentially be necessary – while the divorce was pending.

2. Rule 8.4(d) – Conduct Prejudicial to the Administration of Justice

The original petition charged Libby with violations of Rules 8.4(a), 8.4(c), and 8.4(d). Rule 8.4(a) declares that it is professional misconduct to violate any provision of Rules of Professional Conduct or the Bar Rules and therefore depends on whether the Board has proven another violation. With respect to the remaining issues under Rule 8.4, the Board has narrowed its focus

¹³ Respondent, in contrast, sees this case as one where counsel for Richard attempted to unfairly pressure Anna by withdrawing from a prior agreement of how expenses would be paid and then filing a contempt motion and a bar complaint to obtain further leverage.

on this appeal to Rule 8.4(d), which declares that it constitutes misconduct for a lawyer “to engage in conduct that is prejudicial to the administration of justice.”

Typically, a finding of conduct prejudicial to the administration of justice follows from findings that a lawyer has engaged in illegal conduct or has violated the rules of professional conduct in other respects. However, the Board contends that in this case Rule 8.4(d) provides an independent basis for discipline even if the court affirms the panel’s findings that Libby did not violate any other rules of professional conduct.

The Board’s argument is based on the theory that Anna’s withdrawal of funds engendered considerable litigation – including Attorney Bennett’s motion for contempt, Bennett’s motion to depose Libby, and Libby’s oppositions to those motions – that constituted a costly sideshow and would have been unnecessary if Anna had not made the disputed transfer. This, the Board argues, was prejudicial to the administration of justice and constituted a free-standing violation of Rule 8.4(d).

The court does not agree. First, absent other bar violations, violations for conduct prejudicial to the administration of justice are properly limited to egregious, flagrant, and obvious wrongdoing. *See In re Discipline of an Attorney*, 815 N.E.2d 1072 (Mass. 2004). No such wrongdoing can be found in this case.

Second, if Libby’s advice to his client did not result in a violation of the preliminary injunction, as the panel found and this court has affirmed, then Attorney Bennett was more responsible than Libby for the ensuing and unnecessary motion practice that the Board contends was prejudicial to the administration of justice.

Finally, if a lawyer’s actions resulting in arguably unnecessary litigation of side issues result in a violation of Rule 8.4(d) – even when no other bar violation is involved – this principle

would not simply apply to the case at bar but to every situation where a lawyer's conduct or choice of tactics ignites a brushfire of motion practice that in retrospect does not advance the resolution of the case. However undesirable this may be, it goes beyond any reasonable conception of an ethical violation.

3. Rule 1.5 – Unreasonable Fee

At the hearing Bar Counsel sought to impeach Libby's testimony by noting the fact that another attorney at Libby's firm had included bar complaint research in several time records for the Deutsch divorce. Tr. 133-34, 137-38.¹⁴ Attorney Libby's response was that his firm does not bill for bar complaints and that those entries had been written off. *Id.* The Panel found that there appeared to be a dispute as to the timing of the write-off. Panel Findings at 10.

At the conclusion of the panel hearing on December 17, 2018 the panel instructed both parties to file simultaneous post-hearing closing arguments. In its submission the Board raised for the first time that allegation that Libby had violated M.R. Prof. Conduct 1.5(a) by charging an unreasonable fee. The panel declined to consider this issue because Libby had not received any prior notice of the charge. Panel Findings at 10-11.¹⁵

¹⁴ There is no dispute that attorney's fees relating to bar complaints may not be billed to a client.

¹⁵ Counsel for Libby stated at the December 2, 2019 oral argument that he had sought to file a rebuttal to this new charge, that counsel for the Board had opposed any such rebuttal, and that the Board had declined to accept any rebuttal. The record provided on appeal contains the panel's order declining to accept any rebuttal, which references the other filings, but the other filings were not themselves included. The court does not need to seek any supplementation of the record because the record before the court is sufficient to sustain the panel's ruling. The court agrees, however, that it would have been highly unfair for the panel to consider a new alleged violation raised for the first time in a post-hearing submission without giving Libby an opportunity to respond.

The Board correctly argues that the panel and the court are not precluded from considering bar violations that are not set forth in its original complaint. See *Board of Overseers v. White*, 2019 ME 91 ¶ 2, 210 A.3d 168; *Board of Overseers v. Lefebvre*, 1998 ME 24 ¶ 14, 707 A.2d 69; *Board of Overseers v. Rodway*, 461 A.2d 1062, 1064 (Me. 1983). However, the limiting corollary of this principle is that it applies “absent surprise or other prejudice.” *Lefebvre*, 1998 ME 24 ¶ 14; *Rodway*, 461 A.2d at 1064. In addition, due process requires that an attorney have fair notice of the bar rules alleged to have been violated. *Lefebvre*, 1998 ME 24 ¶¶ 14-16.

In this case counsel for Libby points out that if Libby had known that he was going to be charged with a violation of Rule 1.5(a), he would have offered evidence on that issue. Before a violation could be found, relevant evidence would have included whether the improper entries in the time records were actually charged to the client, whether and when any such charges were written off, and when Libby became aware of those entries and the charges for those entries.¹⁶

The record reflects that the billing records that form the basis for the Board’s contention that Rule 1.5(a) was violated were provided to Bar Counsel on or about December 3, 2018 – two weeks before the panel hearing. If at any point before the hearing – and perhaps even during the hearing – counsel for the Board had put Libby on notice that he was also being charged with a violation of Rule 1.5(a), counsel for Libby could have presented rebuttal evidence. Raising that claim for the first time in a post-hearing brief did not provide Libby fair notice of the claim, and the panel correctly chose to disregard that claim.

¹⁶ Since the panel found that the timing of write-offs was disputed, the court could not make a finding on the Rule 1.5 issue in any event. However, Bar Counsel expressly stated that the Board is not seeking a remand to the panel.

