

STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. Bar-11-19

BOARD OF OVERSEERS
OF THE BAR

v.

DECISION AND ORDER

CHRISTOPHER J. WHALLEY, ESQ.

Five individual bar complaints were filed against Christopher James Whalley, Esq. Pursuant to an order of this court dated October 31, 2007, which was entered as a result of prior bar complaints, these matters were filed directly with the Court by Information. Hearings were held on April 24, 2012, and May 7, 2012, at the Penobscot Judicial Center in Bangor, Maine. The Board of Overseers of the Bar was represented by Aria Eee, Esq., and Whalley was represented by William B. Cote, Esq. The Court will address each complaint or group of complaints in turn.

1. Christiane Gilbert Complaint

Christiane Gilbert, formerly known as Christiane Gilbert-Smith, filed a grievance against Whalley during divorce proceedings against her then-husband. Whalley represented Gilbert's husband in the divorce and a protection-from-abuse matter. Gilbert was unrepresented in both matters. She filed the complaint against Whalley while the divorce and

protection-from-abuse matters were pending. Whalley's client did not file a complaint against Whalley, nor did he testify at the disciplinary hearing. The only witnesses to testify concerning Gilbert's complaints against Whalley were Gilbert, Whalley, and Whalley's legal assistant, LeeAnne Spoon. The Board alleges that Whalley has violated Maine Rules of Professional Conduct 1.3 (requiring a lawyer to act with diligence and promptness); 1.4 (requiring a lawyer to communicate adequately with the client); 3.3(a)(1) (requiring candor toward the tribunal); and 8.4(a), (c), (d) (prohibiting a lawyer from violating any Rules of Professional Conduct; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and prejudicing the administration of justice).

The crux of Gilbert's complaints are that Whalley did not respond to her or the court in a professional or timely manner, thus delaying the proceedings, and that he misrepresented her positions to the court. She also alleges that Whalley was held in contempt of court for not filing documents when required. She is further concerned about one particular continuance that Whalley filed that misstated the facts surrounding the continuance.

The Court finds the following. The divorce and protection-from-abuse proceedings were very difficult for Gilbert. In a separate criminal proceeding, Whalley's client was convicted for his abuse

of Gilbert. Her daughter's safety and her finances were of the utmost concern to her. She filed her complaint with the Board while the divorce and protection-from-abuse matters were pending. This put Whalley in the difficult position of responding to the bar complaint while continuing to work with his client and Gilbert. In effect, he had to justify his actions to Gilbert through the Board's inquiries while representing her husband. Bar Counsel's request for information and the responses it required hampered Whalley in the court proceedings and made communication with Gilbert more difficult.

In addition, Bar Counsel was also concerned about a request for a continuance, signed by Whalley, that LeeAnne Spoon cut-and-pasted from another request. The continuance request as drafted was inaccurate, but was later corrected by Whalley for the benefit of the court and to clarify a misunderstanding.

The Court finds that any incorrect communications by Whalley to Gilbert or to the court were not intentional, and it is not even clear that all of the communications were incorrect. The Court notes that no court personnel, including judges, magistrate judges, or clerks, testified on behalf of the Board. The Board did not prove there was ever a contempt proceeding against Whalley. In fact, Gilbert's divorce proceeded relatively

quickly through the court system, given that it involved a child and a parallel protection-from-abuse matter. The Court recognizes the difficulty of a solo practitioner attempting to handle matters on a low-cost basis and dealing with an unrepresented adversary who was under a great deal of stress. While the Court does not condone sloppy work by Whalley or his staff, his error does not amount to an intentional misrepresentation to the court.

The Court finds that the Board has failed to prove that Whalley has violated the Maine Rules of Professional Conduct regarding Gilbert.

2. The Clarence Hardwick Complaint

Clarence Hardwick filed a bar complaint against Whalley for Whalley's representation of his client, who is a friend of Whalley's. Hardwick was an unrepresented defendant opposing Whalley's client. Hardwick alleges that Whalley misrepresented a proposed settlement to the small-claims court and intentionally did not send Hardwick copies of court filings. Whalley's client did not file a complaint against Whalley, nor did she testify at the disciplinary hearing. Only Hardwick, Whalley, and LeeAnne Spoon testified concerning this matter. Bar Counsel alleges that Whalley has violated Maine Rules of Professional Conduct 1.3 (requiring a lawyer to act with diligence and promptness); 3.1 (requiring a lawyer to communicate adequately with the client); 3.3(a)(1) (requiring candor toward

the tribunal); 4.1(a) (requiring a lawyer to be truthful in statements to third persons); and 8.4(a), (c), (d) (prohibiting a lawyer from violating any Rules of Professional Conduct; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and prejudicing the administration of justice).

The Court finds the following. This small-claims case between Whalley's client and Hardwick involved a perfect storm of errors. Unfortunately, Whalley's client gave him an incorrect address for Hardwick. Due to the client's mistake, Whalley's communications to Hardwick were sent to 215 Mud Creek Road rather than Hardwick's correct address of 211 Mud Creek Road. This matter was further complicated when Hardwick moved during the litigation to Hancock, Maine. Whalley sent Hardwick materials as required by court rules, but to the incorrect address. The materials were never returned to Whalley and he had no way of knowing he was sending materials to an incorrect address.

The more serious allegation is that Whalley purposely misrepresented to the court that Hardwick settled the claim for \$600. Hardwick contends that the claim was not actually settled. Whalley's subsequent actions appear to be consistent with his view that the case was settled for \$600, even though that was not, in fact, the case. There does not appear to be any reason why Whalley would intentionally misrepresent to the court that the case was

settled. The Court notes that Whalley was filing this action on behalf of a client whom he represented pro bono. If the Board's claim is that Whalley was incorrect in his understanding of the disposition of the case, misunderstanding is not a violation of the Rules of Professional Conduct.

Accordingly, the Court finds that there was no intentional wrongdoing by Whalley, and that Whalley has not violated any Rules of Professional Conduct regarding Hardwick.

3. The Sharon Closson, Laurie Ward, and Jessica Meyer Complaints

Sharon Closson is the mother of Laurie Ward and Jessica Meyer. All three clients have filed bar complaints against Whalley for his joint representation of them beginning in 1992. The Board alleges that Whalley has violated then-applicable Bar Rules 3.1(a) (prohibiting a lawyer from violating any Bar Rules); 3.2(f)(3), (4) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and from prejudicing the administration of justice); 3.4(a)(4) (requiring a lawyer to return the client's file upon termination of representation); 3.4(c) (prohibiting a lawyer from representing current clients with unwaived conflicts of interest); 3.6(a) (requiring a lawyer to use reasonable care and skill in the performance of professional services); 3.6(e)(2)(iv) (requiring a lawyer to promptly return the client's property); and Maine Rules of

Professional Conduct 1.3 (requiring a lawyer to act with diligence and promptness); 1.4 (requiring a lawyer to communicate adequately with the client); 1.15(b)(2)(iv) (requiring a lawyer to promptly deliver client's property upon request); 1.16(d) (requiring a lawyer to properly notify client and protect client's interests once representation has ended); and 8.4(a), (c), (d) (prohibiting a lawyer from violating any Rules of Professional Conduct; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and prejudicing the administration of justice).

Closson, at one time, lived with Danny Jacobs and ran a business with him. Danny is the father of Jessica Meyer and Leon Jacobs, Meyer's half-brother. In 1992, Closson and Ward hired Whalley to represent them and Meyer, who was still a minor, in a civil matter against Danny and Leon. Closson alleged that Danny sexually, mentally, and physically abused her, and that she did not receive compensation due her from their business. Ward alleged that Danny sexually abused her. Meyer alleged that Leon sexually abused her. Whalley entered into a contingent-fee agreement with Closson and Ward to represent them and Meyer. The court held a bench trial in 1998.¹ Leon defaulted and Danny appeared but was unrepresented. The court entered a judgment for Closson against Danny in the amount of

¹ Sometime between 1992 and 1998, Danny was criminally convicted for his abuse of Ward.

\$10,000; for Ward against Danny in the amount of \$125,000; and for Meyer against Leon in the amount of \$75,000.

The Board and Whalley's clients now claim that there were conflicts of interest among the clients, poor trial management, and poor trial skills by Whalley in the 1998 trial, and that Whalley failed to collect on the judgments. They also allege that Whalley failed to return their files when the clients asked him to do so.

The Court finds the following. Pursuant to the trial judge's request, Closson and Ward waived their conflicts in writing to the court during the trial. Meyer wrote in her bar complaint that she "will never disagree about the strength of the woman I was raised by," indicating to this Court that neither daughter ever wanted to, nor currently wants to, sue their mother. Closson, Ward, and Meyer never indicated to this Court that they were in any way adverse to one another. Therefore, this Court finds that no conflict existed and that Whalley did not violate any Rules of Professional Conduct or its predecessor rules by representing them jointly. The Court finds that Whalley's trial management in the 1998 trial did not violate the Bar Rules then in effect, despite the concerns expressed by Whalley's clients.

The three clients also allege that Whalley has mishandled their claims post-judgment. Whalley testified that after he received the judgments he

made it clear to his clients that it made no financial sense to proceed with collection of the judgments. The court finds Whalley's testimony credible and reasonable on this point. The contingent fee agreement signed by Closson and Ward on May 22, 1992, entrusts Whalley with the decision to move forward with collection by stating that the client "empowers Attorney to effect a compromise in such matter or institute such legal action as may be advisable in Attorney's judgment." Whalley's belief that pursuing collection would be fruitless is evident in that he received an ex parte attachment in a large amount prior to the trial, but did not request a writ of execution after the trial. He made no effort of any kind to collect on these judgments.

Starting in approximately 2001, and more pressingly starting in 2009, Closson and/or Ward contacted Whalley several times about collecting on the judgment against Danny through a lien, which they thought had been placed on Danny's property in Bass Harbor, Maine, on Mount Desert Island. Testimony at the April 24, 2012, and May 7, 2012, hearings indicated that this property was the only asset in Danny's name. Meyer also inquired about collecting on the judgment against Leon from an inheritance that Leon had received from his mother. Ward and Meyer became increasingly concerned that Whalley was not collecting on their judgments.

Whalley's contention is that he never intended to collect on the judgments, and he testified that he made that very clear to Closson and Ward at the conclusion of the trial in 1998. Whalley testified that he did not want to file any kind of lien post-judgment on Danny's property for strategy reasons and he did not want to proceed later against Leon's inheritance from his mother because his attorney-client relationship had ended and any efforts to collect would be futile. The Court cannot think of any strategy that would not include filing some type of lien on Danny's property. This was not good strategy on Whalley's part, but poor strategy is not a violation of the Maine Rules of Professional Conduct, or its predecessor rules. Whalley was remiss in not recognizing that their expressions of concern about collecting the judgment may have meant that they did not understand that the attorney-client relationship had ended. He did not make clear to his clients that the expense of collection would outweigh any recovery. Nonetheless, his failure to memorialize those communications does not amount to a violation of the Rules of Professional Conduct.

The remaining allegation relates to the clients' file. The Court heard testimony about the clients arranging to pick up their file from Whalley, but neither Closson, Ward, nor Meyer ever picked up the file. In fact, after Whalley prepared the file to be picked up, it sat in his office for over a year

until the first day of the disciplinary hearing, when Whalley turned it over to the clients. The clients were concerned about the return of their file in order to protect their rights, but very few pieces of paper in the file were necessary for them to proceed. Closson's business records from the 1990s and their personal diaries were important to the clients, but they are not important for legal purposes. The judgment would have enabled them to proceed with another attorney. Meyer let valuable time expire by not proceeding against Leon's inheritance with another attorney, but her decision not to do so is no fault of Whalley's.

The Court notes that the civil case against Danny and Leon was a very difficult undertaking. There appears to be no insurance and Danny's only apparent asset was the land in Bass Harbor. Whalley represented Closson, Ward, and Meyer through trial and through a partial appeal to the Supreme Judicial Court. He prepared for trial several times, as the case was not reached on several occasions. Whalley received no payment for any of his work. He did receive some reimbursement for costs. These clients were aware of their low likelihood of success, as Closson and Ward signed a letter to the court during trial acknowledging that "recovering damages could prove difficult or impossible." Closson, Ward, and Meyer mistakenly believe that Whalley should work for them to collect the judgments no

matter what the legal cost. They do not want to or cannot afford to pay anyone else to collect them. At this point, it is unlikely any other attorney will take this on because the fees and costs associated with collecting a judgment of any kind may cost more than the amount recovered.

The Court finds that Whalley's judgment in the matter was clouded by his sexual relationship with Closson, which ended sometime in 1999. There was conflicting testimony about when it ended but more important is that Whalley used poor judgment in entering into a sexual relationship with Closson while he was representing her. The Board does not allege that this dual relationship violated any rules, but it is clear to the Court that in this case, Whalley blurred the lines between a personal relationship and professional legal representation. Among other things, the dual relationship with Closson caused him to be casual in his communications with all three clients, to the detriment of all involved. Better practice would have been for Whalley to have (1) notified his clients in writing after the judgments that he would not take any further action on their behalf, (2) maintained more formal relationships with his clients, and (3) been careful not to blur professional and personal relationships. This does not mean Whalley should not represent friends, but he cannot let his personal relationships with his

clients interfere with his duties to act professionally and to clearly manage his clients' expectations at all times.

Accordingly, the Court finds that Whalley has not violated any Rules of Professional Conduct, or its predecessor rules, regarding Sharon Closson, Laurie Ward, or Jessica Meyer.

4. Conclusion

It is important to recognize that Whalley has been subject to disciplinary action before. The current complaints against him suggest that Whalley's judgment may have been questionable in some respects, but the most concerning of the events in these matters occurred prior to the most recent disciplinary action in 2007. Pursuant to that action, Whalley has been subject to a series of conditions imposed by the Court. His compliance with those conditions signals to the Court that, since 2007, Whalley has a better understanding of the Rules and his obligation to adhere to them. The fact that Whalley has been subject to discipline before does not heighten the ethical standard that he is now held to as an attorney. Simply put, the actions that gave rise to these bar complaints, while regrettable, have not violated the Rules of Professional Conduct or Bar Rules.

The Court further amends its ORDER of October 31, 2007, and now ORDERS that any pending grievances or future grievances proceed pursuant

to the usual procedures as provided in the Maine Bar Rules, and not through an action directly to this Court.

DATED: May 17, 2012

/s/

Warren M. Silver
Associate Justice