STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. Bar-18-03

Board of Overseers of the Bar

Plaintiff

v.

FINDINGS, CONCLUSIONS AND ORDER

Jeffrey P. White, Esq.

Defendant

This matter is before the Court for decision following a hearing in this Bar disciplinary matter held on July 12, 2018, at the Capital Judicial Center in Augusta. The Board of Overseers of the Bar was represented by Assistant Bar Counsel Alan P. Kelley. Attorney Jeffrey P. White appeared and was represented by Attorney Daniel L. Cummings. The issues at hearing addressed a four-count Bar disciplinary information filed with the Court on April 26, 2018.

Based on testimony by the witnesses at the hearing, the exhibits offered and admitted into evidence either by agreement or by ruling of the Court, stipulated facts[1] and rules of the United States Bankruptcy Court for the District of Maine, of which the Court takes judicial notice as discussed with the parties

[1] The referenced stipulated facts include stipulated facts filed in this proceeding by a letter dated June 29, 2018, and stipulated facts agreed to by Attorney White during bankruptcy litigation and appearing in Exhibit 39 filed in this proceeding. Exhibit 39 was not an agreed upon exhibit, but the stipulations agreed to by White and offered by the Board may be considered by the Court pursuant to M.R. Evid. 801(d)(2).

at hearing, the Court makes the following findings. Except for the introductory findings, the findings will be ordered by the four separate counts in the information which each address a separate disciplinary complaint.

Attorney Jeffrey P. White has been practicing law for thirty-seven years. He was initially admitted to practice in Illinois and testified that he moved to Maine in 2003 and was admitted to practice in Maine in 2008. White has considerable experience in bankruptcy matters. Currently, ninety-five percent of his practice involves bankruptcies. He operates a solo practice in Auburn with the assistance of a paralegal for office management, bookkeeping and other functions related to maintenance of his law practice. By operation of Maine Rule of Professional Conduct 5.3, White is fully responsible, ethically, for proper supervision of his paralegal assistant and is ethically accountable for any actions related to his practice that his paralegal has taken under his direction.

COUNT I

The Polombo Complaint

1. On September 4, 2014, Peter J. Polombo, Jr. and his wife retained White to draft a deed transferring real estate owned by Mrs. Polombo individually to the couple as joint owners, and to draft an easement for the property.

2. Mr. and Mrs. Polombo gave White a copy of a deed with a description of the property to be conveyed, along with a copy of the survey showing the requested easement and paid him a retainer of $300.

3. A second meeting was scheduled at Mr. Polombo's request on September 24, 2014; however, White had to cancel the meeting. No further meetings occurred.

4. Mr. Polombo's phone records indicate that he subsequently called White's office on ten different occasions between October 2, 2014, and January 22, 2015, with each call showing a duration of no more than two minutes. Attorney White does not recall having received that many calls from Mr. Polombo but believes he did speak with Mr. Polombo by telephone on more than one occasion during that period of time.

5. Attorney White never provided the Polombos with the deed or the easement that they had retained him to draft.

6. On May 2, 2015, Mr. Polombo emailed White requesting a return of the documents that had been provided to White and a return of the $300 retainer. Attorney White did not respond.

7. On May 28, 2015, Mr. Polombo attempted to email White requesting a return of the documents the Polombos had provided to White and

the return of the $300 retainer. Because Mr. Polombo used an inaccurate email address, White never received that second email.

8. On June 5, 2015, Mr. Polombo filed a complaint with the Board against Attorney White.

9. White never read Mr. Polombo's May 2, 2015, email until after he received Mr. Polombo's complaint forwarded to him by Bar Counsel. Responding to Bar Counsel by a letter dated July 9, 2015, White called the Polombo complaint a "clarion call" motivating him to reexamine his practice to achieve "better client communication and reduce my client load."

10. White sent a letter, also dated July 9, 2015, to Mr. Polombo acknowledging that he was "not timely in finalizing the drafting" that Polombo requested and apologizing for that failure. He included with the letter the original documents Polombo had sent him and an unsigned personal money order made out to Mr. Polombo in the amount of $300. After the money order was returned to White for signature, White signed the money order and returned it to Mr. Polombo on July 22, 2015.

11. When asked why he had not returned Mr. Polombo's retainer using a check drawn on his trust account, White indicated that it is his practice to repay client funds by use of a money order rather than checks drawn on his

trust account. White did testify that the Polombos' retainer was placed in his trust account, but there is no documentary evidence to support that claim.

12. The Court finds that the Polombos $300 retainer was never put in any trust account, and, whatever account the $300 was placed in, the balance in the account become so low that the $300 could not be repaid when the Polombos requested return of their retainer.

13. The Court finds that White's dilatory conduct in failing to do the work that he was engaged by the Polombos to do and failing to promptly return the retainer and original documents provided to him by the Polombos after the May 2, 2015, request that the retainer and documents be returned, constituted violations of Maine Rules of Professional Conduct 1.3 (dilatory conduct in representation); 1.4(a)(2)(3) & (4) (communication with clients); 1.5(i) (safekeeping and return of unused retainer); and 1.16(d) (return of paid but unearned fees upon termination of representation).

14. The Court finds that White's failure to place the Polombos' retainer in a trust account or his failure to maintain a sufficient balance in his operating account to protect the integrity of the Polombos' retainer until he performed and billed for the services for which he was retained is a violation of Maine Rule of Professional Conduct 1.15(b), requiring that client funds be placed in and maintained in a trust account until they are earned or repaid to the client,

including Rule 1.15(b)(2)(iv), requiring that upon a client's request, funds the client is entitled to receive be promptly paid or delivered to the client.

COUNT II

The Nadeau Complaint

15. In August of 2013, Jackson Nadeau and his wife met with Attorney White seeking legal assistance regarding the foreclosure of their home mortgage.

16. Attorney White's initial advice to the Nadeaus was that they should consider filing bankruptcy. However, the Nadeaus were unwilling to file bankruptcy at that time.

17. On August 5, 2013, Mr. Nadeau wrote a check to White for $1,500 as a retainer.

18. After writing the check, Mr. Nadeau again met with White who reiterated to Mr. Nadeau that bankruptcy was the "best option" for them. However, the Nadeaus remained unwilling to pursue bankruptcy at that time.

19. Prior to this hearing, and in accordance with Court's scheduling order, the parties met to prepare and disclose exhibits, determine which exhibits could be admitted by agreement and which exhibits would be contested and to attempt to stipulate facts to aid in focusing the issues and, if possible, avoid the need to call certain witnesses at hearing. As a result of the

stipulations of facts agreed to by Bar Counsel and counsel for White, there was no need to call witnesses to address the issues related to Count I and Count II in the information.

20. At the hearing, White testified that the Nadeaus had retained him to consider a bankruptcy and that the retainer was paid to him to do nothing specific but to be ready to proceed with a bankruptcy matter if the Nadeaus' unrepresented efforts to address the foreclosure matter did not resolve as the Nadeaus hoped it might. This testimony by White at the hearing was the first time there was any indication in the record, stretching back to the Nadeaus' June 2015 complaint that the purpose for which the Nadeaus retained White was to be prepared to pursue a bankruptcy but otherwise do nothing until the Nadeaus' unrepresented efforts to defend the foreclosure led them to determine that they should pursue a bankruptcy.

21. After White made this statement testifying at hearing, the Court noted the inconsistency between White's statement and the agreed stipulation that the Nadeaus had retained White "seeking legal assistance regarding the foreclosure of their home mortgage." (Stipulated fact 11.)

22. In response to a question from the Court, counsel for White indicated that perhaps the stipulation should be withdrawn. However, withdrawing a stipulation would have prejudiced the Board because the

witnesses who could have testified to the purpose for which White was retained were unavailable as a result of the stipulation. Further, the stipulation was consistent with the position maintained by the Board, with no contrary statements or arguments by White, in the two years between the Nadeaus' filing of their complaint with the Board and the July 12, 2018 hearing.

23. The Court finds that White's testimony that the purpose for which the Nadeaus retained him was to simply be available to proceed with a bankruptcy if their unrepresented efforts to defend the foreclosure action were unsuccessful was false and designed to justify his failure to act after he was retained by the Nadeaus.

24. The parties agree (Stipulation 15), that between August of 2013 when he was retained to defend the foreclosure action, and January of 2015, the Nadeaus had no contact with Attorney White.

25. Mr. Nadeau spoke with Attorney White by telephone sometime during the winter of 2015, and Attorney White agreed to provide a bill for services rendered, and to return the unused portion of the $1,500 retainer.

26. Attorney White failed to provide a bill or to return the unused portion of the Nadeaus' retainer.

27. On April 30, 2015, Mr. Nadeau sent a letter by certified mail to Attorney White formally requesting a "final accounting of fees along with any unused portion of the retainer."

28. Mr. Nadeau did not receive a response to his April 30, 2015, letter, and he filed a complaint with the Board of Overseers on June 25, 2015.

29. As was the case with the Polombo matter, White responded to the Nadeaus' earlier requests for an accounting of services rendered and return of the retainer only after having the complaint referred to him by Bar Counsel.

30. White responded to Bar Counsel regarding Nadeaus' complaint in a letter dated July 24, 2014 and received by the Board on July 28, 2015, acknowledging that he had been paid the $1,500 retainer and that he had been slow in his response the Nadeaus' refund request. (The July 24, 2014 date on White's letter was apparently a typographical error.).

31. White advised that workload, staffing turnover and staffing shortages in his office caused the delay.

32. Around July 24, 2015, White wrote a letter, also dated July 24, 2014, enclosing a cashier's check for $1,500 to Mr. Nadeau stating "I acknowledge that I was not timely in responding to the contacts made in the last few months and apologize for same. I feel sincere disappointment in myself personally and professionally for not responding sooner." (Exhibit 9).

33. Attorney White's failure to perform any work in response to being retained by the Nadeaus, his failure to respond to communications from the Nadeaus, his justification for his failure to respond, and his failure to promptly return the unused retainer constituted violations of Maine Rules of Professional Conduct 1.3 (dilatory conduct in representation); 1.4(a) (2)(3) & (4) (communicating with clients); 1.5(i) (reasonably prompt return of unused retainer); 1.16(d) (return of paid but unearned fees upon termination of representation); and 8.4(c) (dishonesty, deceit or misrepresentation).[2] There is insufficient evidence in the record for the Court to determine whether, or not, the Nadeaus $1,500 retainer was properly placed in and maintained in a client trust account. Accordingly, the Court can find no violation of the trust account obligation.

COUNT III

The Judge Cary Complaint

34. In May of 2016 Attorney White represented DJM Enterprises, LLC (DJM), a limited-liability corporation, in its attempt to reorganize under Chapter 11 of the federal bankruptcy law. A contested hearing was scheduled

[2] Recognizing the imperfections of the fact-finding process, the Court is reluctant to find testimony false simply because that testimony is inconsistent with other evidence. Here, however, Attorney White's testimony which the Court finds to be false was contrary to an agreed stipulation of fact and was not supported by any other statement offered during the two years this matter has been pending.

for May 17, 2016, to address confirmation of the DJM reorganization plan. The hearing was before Federal Bankruptcy Judge Peter G. Cary.

35. Bangor Savings Bank and the United States Trustee opposed confirmation of the reorganization.

36. In preparation for contested hearings in bankruptcy court, there is a practice for the parties to communicate in advance and prepare a book of exhibits to be presented to the bankruptcy judge at the hearing. Attorney White testified that such a book of exhibits is prepared independent of the electronic filing practices of the bankruptcy court.

37. In accordance with the advance preparation of exhibits practice, White forwarded various proposed exhibits for the hearing to other counsel. Included with those exhibits was Exhibit 28 (Exhibit 10A in this proceeding) which purported to be a "Confirmation Affidavit of Deborah J. Miles" indicating that it had been signed and sworn by her, and acknowledged by White, on May 16, 2016. White was indicated as the attorney who had taken his client's oath and witnessed the signature of the affidavit. A conformed copy of the affidavit, purporting to have been signed, was presented to the Bankruptcy Court as Exhibit 28.

38. The book of the twenty-eight exhibits, twenty-six of which were stipulated to be admissible by the parties, was presented to the court at the May

17 hearing. Exhibit 28 was one of two exhibits that were not stipulated by opposing counsel.

39. Deborah Miles was present and testified at the hearing, with her testimony consistent with the statements in the affidavit dated May 16.

40. On cross-examination, counsel for Bangor Savings Bank presented Miles with Exhibit 28, and Miles testified that she had neither seen nor signed the affidavit.

41. Upon further examination by counsel for the United States Trustee and redirect examination by White, Miles testified that she had reviewed the information contained in the affidavit with White by telephone and that she agreed with the content of the affidavit, but that she had never received or reviewed a physical copy of the affidavit. Miles further testified that White had asked her to remind him to have her sign the affidavit when she appeared at the hearing on May 17, but she had neglected to do so.

42. The next day, May 18, 2016, Judge Cary filed a complaint with the Board asserting that White's presenting for the court's consideration what purported to be a signed and sworn affidavit that White himself had acknowledged was a misrepresentation and false statement to the tribunal.

43. At a later date in the bankruptcy proceeding, Judge Cary indicated that he did not consider Attorney White's actions presenting the purportedly

signed affidavit as an exhibit to be a particularly serious violation, "inclusion of the affidavit was inadvertent and certainly not intentional." (Exhibit 15). There had been no prejudice to the proceedings because Miles had appeared and testified to the facts as stated in the affidavit and had been subject to cross-examination.

44. Responding to Bar Counsel's reference to him of Judge Cary's complaint, White admitted that he had submitted the document purporting to be a signed affidavit as an exhibit, even though it was never actually signed. White asserted that this submission was the result of "inadvertence and oversight" and "was in no way intentional."

45. The Court finds that White's actions on May 16, 2016, presenting for inclusion in the book of exhibits to be presented to the Judge an affidavit that he represented had been signed and sworn to by his client and that indicated that he had taken the client's oath and witnessed the signature upon the affidavit was a violation of Maine Rules of Professional Conduct 3.3(a) (candor toward a tribunal); 3.4(b) (falsifying evidence); and 4.1(a) (truthfulness in statements to others).

The Court accepts Judge Cary's observation that while he found it necessary to report these violations in accordance with his ethical obligations as a Judge, the violations were not particularly serious, resulted from

inadvertence, and did not in any way prejudice the proceeding because the witness was available to testify and acknowledge the facts in the affidavit through her testimony.

COUNT IV

The United States Bankruptcy Trustee's Complaint

46. An individual named Roy Y. Salisbury owns or has a significant interest in at least six organizational entities including partnerships or corporations. Those entities include one called RYS & Company Management, LLC, another called Regulus Corporation, and another called Small Business Development Group Inc. (SBDG).

47. At some time in 2015, White spoke with Salisbury regarding initiating a bankruptcy proceeding for SBDG. Email communications in December 2015 (Exhibit 17B) indicated White was being retained "to handle the negotiations on the Darling matters and/or C.11 proceedings if deemed necessary." In their communications, Salisbury and White agreed to a retainer of $25,000 to $30,000, to be paid at a monthly rate of $7,500 to prosecute the bankruptcy proceeding. An initial payment of $7,500 was received by White in December 2015, prior to filing the bankruptcy proceeding.

48. On or about January 5, 2016, SBDG, represented by White, filed a petition for relief under Chapter 11 of the Bankruptcy Code in Bankruptcy Court.

49. The rules of the Bankruptcy Court require that attorney fees commitments, including commitments made for future payments and funds paid prior to the bankruptcy filing (funds paid "pre-petition"), be disclosed in the bankruptcy filings and that no expenditures from such funds be made until expenditures are approved by the Bankruptcy Court.

50. On or about February 5, 2016, SBDG, represented by White, filed an amended application to employ White for its pending Chapter 11 bankruptcy. The amended application indicated that White had been paid $7,500 for legal fees "pre-petition" prior to the filing of the bankruptcy petition. No other payments or commitments for payment by a retainer were indicated in the amended application.

51. On or about February 3, 2016, two days before the filing of the amended application, by a check dated February 3, 2016, White's office was paid an additional $7,500, the second payment of the agreed retainer.

52. At different times White contended that this second $7,500 payment to him was an error by SBDG and a gift to SBDG by Regulus Corp. *See* White agreed stipulations 41-45 in Exhibit 39. Characterizing the payment as

a gift was an effort to avoid reporting the payment from Regulus as an obligation of SBDG in bankruptcy filings.

53. By Bankruptcy Court Rules, approval of the Bankruptcy Court is required before any funds from the retainer could be paid over to the attorney for services rendered. Without Bankruptcy Court approval, the second $7,500 was deposited into White's firm's business operating account, not the firm's trust account.

54. White contends that the deposit of the $7,500 into his operating account was a result of an error by his paralegal. However, White has responsibility for proper supervision and compliance with the Rules of Professional Conduct by his staff and, if the payment into the operating account was an oversight by a staff member, White is responsible, ethically, for that oversight. *See* Rule of Professional Conduct 5.3.

55. The oversight in this case would be particularly egregious because any properly trained staff member of an attorney's office would know that funds paid as a retainer must initially be deposited in a trust account as required by Rule 1.15(b) subject to later payments into a firm's operating account only upon proper billing for services – and here upon approval of the Bankruptcy Court. White testified that the paralegal had been working with him for approximately ten years. Therefore, it seems highly unlikely that the

choice to deposit the $7,500 second retainer payment into the operating account was an oversight by the paralegal, without White's knowledge.

56. That this deposit into the operating account was intended, and not an oversight, is confirmed by the account statement for the operating account for the month of February 2016. That statement indicates that without the $7,500 payment early in the month, the operating account would have had a significant negative balance through most of the month.

57. The Court finds that the deposit of the second $7,500 payment into the firm's operating account was an intentional act taken or approved by White in violation of Bar Rule 1.15(b) requiring deposit of retainers into trust accounts and in violation of Rules 2016 and 2016-1 of the United States Bankruptcy Court. Rules 2016 and 2016-1 require that (i) payments to attorneys and commitments for future payments, such as retainer agreements, be disclosed in applications to employ attorneys, and (ii) no retainers or other funds paid by debtors in bankruptcy to their attorneys be paid to attorneys for services and thus to operating accounts until payment of such funds is approved by the court.

58. White failed to obtain the bankruptcy court's approval prior to receiving and paying into his operating account the second $7,500 fee and he

failed to notify the U.S. Trustee within fourteen days after receipt of the payment into his operating account as required by the Bankruptcy Court Rules.

59. Upon learning of the undisclosed and unapproved payment, the Trustee's office filed a motion for order to show cause with the Bankruptcy Court. White responded to the Trustee's motion by stating that the deposit of the February payment was made in error, and that he had returned the funds to the debtor "as soon as the error was discovered." White agreed to a consent order with sanctions being entered by the Bankruptcy Court (*Fagone, J.*) on the Trustee's motion.

60. After the consent order related to the returned $7,500 payment was entered, the Trustee's office learned, by taking the deposition of Roy Salisbury, that White's agreed retainer was $25,000 to $30,000, not the $7,500 that White had initially claimed. The total anticipated retainer, $25,000 to $30,000 was required to be disclosed in the original bankruptcy filing, but was not disclosed.

61. As a result, the Trustee's office believed that White had misrepresented the nature of the fee agreement in his original filings with the Bankruptcy Court as well as in his later dealings with the Trustee and the Bankruptcy Court. Consequently, the Trustee filed a complaint with the Board.

62. Attorney White responded to Bar Counsel's reference to him of the Trustee's complaint asserting that he had not misrepresented the fee agreement and that it had been clear that the debtor was to set aside $7,500 per month to be applied to the fee, with the actual monies to be paid over to White only after court approval. Accordingly, White claimed that the Trustee's concerns were "unfounded." White's claim that the Trustee's concerns were "unfounded" was inconsistent with the fact that prior to the Salisbury deposition, White had never disclosed in any filing with the court that the total agreed retainer was $25,000 to $30,000, and inconsistent with White's earlier position that the second $7,500 payment was a mistake that had been repaid to the debtor.

63. Attorney White's filings of documents misrepresenting the amount of his agreed retainer and anticipated fee, his payment of retainer fees into his operating account without prior court approval, and his receipt of additional fees around the time of his initial Bankruptcy Court filing without approval of the court or disclosure of the U.S. Trustee were violations of Maine Rules of Professional Conduct 1.5(a) (excessive fee); 3.3(a) (candor toward the tribunal); 4.1(a) (false statement of material fact); and 8.4(c) (deceit or misrepresentation).

64. The deposit of the $7,500, which White acknowledges was received as a retainer, into his operating account, instead of his trust account, was a violation of Maine Rule of Professional Conduct 1.15(b) and demonstrates failure to properly supervise staff as required by Rule 5.3.

SANCTIONS

Based on the findings regarding violations of several Rules of Professional Conduct with regard to Counts I, II and IV of the complaint and findings of minor violations of the Rules of Professional Conduct with regard to Count III of the complaint, the Court must proceed to consider sanctions. The Court's scheduling order and discussion with counsel at hearing indicated that, after making its findings, the parties presentations should also enable the Court to consider and impose sanctions as part of its disposition of the order after hearing.

Because the Court's findings indicate some serious and intentional violations of the Maine Rules of Professional Conduct, including some knowingly false statements made to the Bankruptcy Court and to this Court, the Court will not address sanctions without giving the parties further notice and opportunity for hearing on the sanctions issue. At the sanctions hearing the Court will explore further why an attorney with thirty-seven years' experience in practice, and including very substantial experience with the Bankruptcy

Courts and bankruptcy practice would engage in such significant and serious violations of both the Rules of Professional Conduct and the rules and practices of the Bankruptcy Court.

Accordingly, with the findings stated above, the Court will schedule a further hearing to address sanctions. Among other things, at that hearing, the parties should be prepared to (i) discuss whether, in addition to the agreed order entered by Judge Fagone, Attorney White has any prior history of sanctions before any professional disciplinary body or any court; (ii) indicate the practices in his office that apparently led to failure, at least with regard to Counts I and IV, to deposit funds into a trust account despite the requirements of Rule of Professional Conduct 1.15; and (iii) make proposals regarding appropriate sanctions.

A date for the hearing on sanctions will be set by a separate order.

Dated: July 30, 2018

/s/
Donald G. Alexander
Associate Justice