STATE OF MAINE

SUPREME JUDICIAL COURT
Docket No. Bar-18-03

Board of Overseers of the Bar

Plaintiff

v.

SANCTIONS ORDER

Jeffrey P. White, Esq.

Defendant

This matter is before the Court for determination of sanctions following the Court's July 30, 2018, decision finding many violations of the Maine Rules of Professional Conduct after a hearing on the Board of Overseers of the Bar's four-count disciplinary information.

The sanctions hearing was held on September 27, 2018, at the Capital Judicial Center in Augusta. At the sanctions hearing, the Board of Overseers of the Bar was represented by Assistant Bar Counsel Alan P. Kelley. Attorney Jeffrey P. White was represented by Attorney Daniel L. Cummings. Attorney White elected not to appear in person.

THE RECORD FOR CONSIDERATION

In its July 30 order, the Court had requested that the Board present reports of any prior disciplinary actions in which Attorney White had been involved. In response, the Board presented reports of two prior disciplinary

actions before the Grievance Commission, GCF No. 11-148 and GCF No. 14-152. Each included findings of violations of the Rules of Professional Conduct but resulted in dismissals with warnings.

Pursuant to Bar Rule 21(b)(3), a dismissal with a warning is "a private non-disciplinary sanction." However, when there is a subsequent disciplinary proceeding involving the same individual, Bar Rule 21(b) directs that "sanctions issued under this Rule shall be provided to tribunals in any subsequent proceedings in which the respondent has been found to have committed misconduct as evidence of prior misconduct bearing upon the issue of the proper sanction to be imposed in the subsequent proceeding." Thus, the history of GCF No. 11-148 and GCF No. 14-152 and the findings of violations of the Rules of Professional Conduct may be considered in determining the appropriate sanction in this proceeding.

A. GCF No. 11-148

On November 17, 2011, a Grievance Commission panel reviewed a complaint and issued a decision that concluded as follows:

> [A client] retained Attorney White in February 2010 to file for bankruptcy. However, in March, 2010, they agreed that work on [the client's] case should be postponed. Approximately a year later, [the client] attempted to retrieve his file material and the unused portion of his retainer. He called and went to Attorney White's office. Attorney White, however, was unavailable to communicate with [the client] at either of those times. Attorney White made no

> subsequent effort to contact [the client] until after this grievance complaint was filed. Even though Attorney White was struggling to cover cases because an associate attorney had left his firm abruptly, he had a duty to timely respond to client . . . communications. Attorney White's conduct in failing to respond to [the client] was a violation of M.R. Prof. Conduct 1.4(a)(4). Attorney White hired a new associate shortly after he failed to respond to [the client] and fully refunded the unearned portion of [the client's] retainer. Because the misconduct was minor, there was little harm to the client, *and the misconduct is unlikely to be repeated by this attorney,* we dismiss the complaint against Attorney Jeffrey P. White with a warning to promptly respond to communications from his clients. (Emphasis added.)

As a result of that determination, including the panel's finding that the moderating circumstances described within former Maine Bar Rule 7.1(d)(4)(A) were present, the panel directed that the complaint be dismissed with a warning to Attorney White to refrain from such misconduct in the future.

B. GCF No. 14-152

On August 20, 2014, a Grievance Commission panel reviewed a complaint and issued a decision that concluded as follows:

> [A client] complains that Attorney Jeffrey P. White failed to provide competent representation in violation of M.R. Prof. Conduct 1.1; failed to act with reasonable diligence in violation of M.R. Prof. Conduct 1.3; failed to reasonably keep her informed or respond to her requests for information in violation of M.R. Prof. Conduct 1.4; and engaged in conduct prejudicial to the administration of justice in violation of M.R. Prof. Conduct 8.4(d).
>
> A comprehensive review of the record establishes that Attorney White represented [the client] and her former husband in a Chapter 13 Bankruptcy proceeding that he ultimately converted

> to Chapter 7 Bankruptcy proceedings after [the client's] divorce, and subsequent inability to make payments under the Chapter 13 plan. Although Attorney White ultimately obtained a discharge in bankruptcy for [the client] through the Chapter 7 proceeding, the record establishes that he failed to keep his client reasonably informed of the status of her matter, or to comply with her reasonable requests for information. In addition, as a result of Attorney White's failure to respond to inquiries and requests by the Bankruptcy Trustee, the Trustee filed a Motion to Dismiss the Chapter 13 proceedings, and subsequently recused himself from [the client's] Chapter 7 proceedings. Based upon those facts, probable cause is established to find that Attorney White violated M.R. Prof. Conduct 1.4, and M.R. Prof Conduct 8.4(d).
>
> However, the Panel concludes that Attorney White's misconduct was minor, and that there was little or no injury to [the client], the public, the legal system, or the profession directly attributable to his actions. The Panel further concludes that *there is little likelihood of repetition by Attorney White.* Accordingly, the complaint against Attorney White is dismissed with this warning to refrain from any similar misconduct in the future. (Emphasis added.)

As a result of that determination, including the panel's finding that the moderating circumstances described within former Maine Bar Rule 7.1(d)(4)(A) were present, the panel directed that the complaint be dismissed with a warning to Attorney White to refrain from such misconduct in the future.

A review of the dismissals with warnings in GCF No. 11-148 and GCF No. 14-152 indicates that the ethical violations in each, that the Grievance Commission hoped would not be repeated, are similar to some of the ethical violations found regarding Counts I, II and IV of the Board's information.

Therefore, the prior Grievance Commission determinations are relevant to the issue of sanctions pursuant to Bar Rule 21(b).

The prior Grievance Commission reports, described above, were the only factual matters added to the record at the sanctions hearing.

As part of his closing argument, Attorney White's counsel argued that two of the Court's fact findings in the July 30 order should be vacated. Those findings were (i) a determination, with regard to Count I, that the retainer paid in Count I was never placed in a client trust account, thus violating Rule of Professional Conduct 1.15(a), and (ii) the finding with respect to Count II that, at the July 12, 2018, hearing, Attorney White had testified falsely when he stated that he had been retained by the client to pursue a bankruptcy rather than a foreclosure, when retention to pursue a foreclosure had been previously stipulated to.

On the record, the Court denied the request to vacate its prior findings. After the Court's July 30 order, Attorney White had initiated no effort to seek reconsideration or alteration or amendment of those findings. At the sanctions hearing, Attorney White was not present and offered no testimony to contest or seek to clarify the Court's prior findings.

Relevant to the sanctions issue, Attorney White argued, through counsel, though he presented no evidence, that he currently has over 100 clients

involved in various stages of bankruptcy proceedings and that he anticipates winding down his practice after another couple of years. Although not presented as evidence, the Court accepts these representations by counsel as part of the record for consideration of sanctions.

At this point, before addressing sanctions directly, the Court would also incorporate by reference the order of July 30. The findings and conclusions stated in the July 30 order will not be repeated in this order.

STANDARDS FOR SANCTIONS CONSIDERATION

Following the July 30 order, the Law Court, on August 28, 2018, issued an opinion, with two separate opinions, purporting to comprehensively address proper practice for imposition of sanctions. *Board of Overseers of the Bar v. Prolman*, 2018 ME 128, --- A.3d ---. The first of the two three-Justice opinions, *id.* ¶¶ 28-50, suggested that, to determine and review sanctions for professional misconduct, the Court adopt a process very similar to the process for setting and reviewing criminal sentences imposed by *State v. Hewey*, 622 A.2d 1151, 1154-55 (Me. 1993).[1]

In *Hewey*, the Court had directed that, based on the circumstances of the particular crime as committed, the court should identify a "basic sentence" and

[1] *Hewey* was not cited in the first three-Justice opinion, but the sanction determination process it recommends is virtually identical to the so-called *Hewey* formula adopted a quarter century ago.

then, with the "basic sentence" determined, evaluate aggravating and mitigating factors to set the final sentence and the determination of whether all or any of the final sentence should be suspended and the defendant placed on probation with conditions. *Id.* at 1154-55. In *Prolman*, the first three-Justice opinion directed the Court to examine Bar Rule 21(c) together with American Bar Association's Standards for Imposing Lawyer Sanctions (Am. Bar. Assoc. 1992) to determine a "presumptive sanction" then, as in *Hewey*, apply aggravating and mitigating factors to set a final sanction and to determine whether any or all of that final sanction should be suspended with the attorney placed on probation with conditions. *Prolman*, 2018 ME 128, ¶¶ 31-35, ---A.3d ---.

Unfortunately, as with the "basic sentence" in *Hewey*, there is no available statistical or experiential basis in Maine practice for a judge imposing a sentence or a disciplinary sanction in any particular case to determine what that basic sentence or presumptive sanction ought to be. And, determination of the presumptive sanction, as suggested in the first separate opinion in *Prolman*, is far more difficult than the process for setting the basic sentence as directed in *Hewey*. Unlike a criminal sentencing where a sentence is imposed on each count of a charging document, here, the Court must consider an overall sanction for four separate instances of professional misconduct, with the

appropriate sanction to be informed by the two prior Grievance Commission determinations regarding violations of the Rules of Professional Conduct.

Determination of the presumptive sanction according to the formula suggested in the first three-Justice opinion is also difficult in the attorney discipline setting because many of the findings of violations of the Rules of Professional Conduct made in the violation determinations present issues identical or nearly identical to factors that would be considered as aggravating or mitigating factors in the later stages of the formula determination. For example, findings of dilatory conduct, violations of duties owed to a client, and the extent to which the lawyer did or did not plan or intend the ethical violation that support findings of specific ethical violations cannot be double counted when, later in the formula, the court is identifying aggravating and mitigating circumstances.

While separation of determination of the presumptive sanction from determination of aggravating and mitigating factors may conceptually sound simple, in practice it is very difficult. The heavily structured *Hewey*-type analysis suggested in the first separate opinion in *Prolman* is difficult if not impossible to apply in cases of multiple violations. As the second separate opinion notes, the formula suggested in the first separate opinion is "an unnecessarily cumbersome process." *Prolman*, 2018 ME 128, ¶ 51, --- A.3d ---.

The Court itself had to decide imposition of sanctions for professional misconduct in *In re Nadeau*, 2017 ME 121, 168 A.3d 746. *Nadeau* involved six separate actions leading to charged violations of the Code of Judicial Conduct, with the Court finding ethical violations incident to five of those actions. The Court utilized no formula to determine the sanction. Rather, it looked at the misconduct at issue and the individual's history of ethical violations, and then applied its collective discretion to impose a two-year suspension from the practice of law as an appropriate sanction.

SANCTIONS DETERMINATION

To address sanctions in this case, the Court will proceed according to the second separate opinion in *Prolman*. *See Prolman*, 2018 ME 128, ¶¶ 51-59, --- A.3d ---. It will utilize the analytical structure set in Bar Rule 21(c)—looking at the events involved in each violation and applying the Court's discretion and experience to set an appropriate overall sanction, considering the facts of the four separate counts and the prior record.

Comparing the facts found regarding Counts I and II in the Court's July 30 order and the information provided in the history of GCF No. 11-148, the facts underlying the ethical violations are strikingly similar. In each, a client retained Attorney White to provide legal services; the services were not provided; the client engaged in an extended effort to contact Attorney White, with limited

success, to seek return of the funds paid for which no work had been done; and, in each case, Attorney White only responded and returned the funds after the client had filed a grievance complaint.

In responding to the complaint in Count I in this action, Attorney White called the complaint that followed a long effort to seek return of funds a "clarion call" that motivated him to reexamine his practice and improve client communication. That "clarion call" term may sound like a good excuse to minimize the misconduct incident to Count I, however, unfortunately, the claim of a new understanding, a "clarion call," rings hollow when GCF No. 11-148 reveals almost identical conduct—failing to adequately maintain communications with clients and failing to return a retainer for services not performed. The conduct in GCF No. 11-148 was also similar to that addressed in Count II where, again, the client was attempting to contact Attorney White, for quite some time, to get money back and only received a response after filing a complaint with the Board.

Considering the problems addressed in Counts I and II relating to failure to do requested work, the additional facts from GCF No. 11-148 indicate a disturbing pattern, extending over four or five years, of getting retainers from clients, not doing the work for which the retainer was given, and then, when the clients began efforts to seek return of the funds, ignoring or disregarding

communications from the clients and failing to respond to clients until after a complaint was filed with the Board.

The report in GCF No. 14-152 further confirms the continuing pattern over a four- or five-year period of failing to communicate with clients, failing to keep clients reasonably informed of the activities for which Attorney White was retained and failing to respond to requests for information. Most notably, in August 2014, when the report in GCF No. 14-152 was issued, Attorney White had already received and held the retainer at issue in Count II for a year without performing any legal services for or communicating with his clients. The misconduct that the report in GCF No. 14-152 stated "is unlikely to be repeated by this attorney," was being repeated in what became Count II as the Grievance Commission report issued.

The facts in GCF No. 14-152 also indicate, as occurred in Counts III and IV, a failure to comply with the statutes and rules governing bankruptcy proceedings, including failure to respond to inquiries and requests made by the Bankruptcy Trustee in the GCF No. 14-152 matter, relating to the change in the client's marital status, thus engaging in conduct prejudicial to the administration of justice.

The total conduct on which the sanctions must be imposed includes (1) several instances, indicating a pattern, of failing to act on a client's behalf

with reasonable diligence; (2) several instances, indicating a pattern, of failing to keep clients reasonably informed and respond to requests for information or the return of funds; (3) several instances, indicating a pattern, both in dealing with clients and dealing with the bankruptcy court, of dilatory conduct in representation; (4) several instances, indicating a pattern, of failing to return paid but unearned fees upon termination of representation; (5) three instances of failure to timely and accurately inform the Bankruptcy Court of facts regarding the status of cases or of documents filed in cases; (6) two instances of failure to place funds in client trust accounts; (7) one instance of giving false testimony to this Court regarding the purposes for which Attorney White was retained in Count II; (8) trying to cover up and misrepresent to the Bankruptcy Court and the Trustee the true extent of his retainer addressed in Count IV; and (9) the failure to properly supervise staff finding in Count IV based on Attorney White's blaming his staff, not accepting responsibility himself, for some of the conduct incident to his efforts to cover up the true extent of his retainer in Count IV.

Regarding the violations of professional obligations found by this Court in regard to Count III, the Court accepts the Bankruptcy Court's observations that those violations "were not particularly serious." Accordingly, for the Count

III violations of the Rules of Professional Conduct, the Court will impose a sanction of a public reprimand, Bar Rule 21(b)(5).

Turning to the factors to be reviewed in determining the extent of the sanctions for the violations found regarding Counts I, II, and IV, Bar Rule 21(c) provides the guide:

> **(c) Factors to be Considered in Imposing Sanctions.** In imposing a sanction after a finding of lawyer misconduct, the Single Justice, the Court, or the Grievance Commission panel shall consider the following factors, as enumerated in the ABA Standards for Imposing Lawyer Sanctions:
>
> (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
>
> (2) whether the lawyer acted intentionally, knowingly, or negligently;
>
> (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and
>
> (4) the existence of any aggravating or mitigating factors.

Review of the 21(c) factors:

First factor, violation of a duty owed to a client, to the public, to the legal system, or to the profession: Counts I and II involves violation of a duty owed to a client; Count IV involves violations of obligations to the legal system, here the Bankruptcy Court, and Counts I, II, and IV involves failures of Attorney White's duties to the profession by his repeated dilatory conduct, failure to adequately communicate with clients, and failure to promptly and honestly communicate

accurate information about the case he was involved with to the Bankruptcy Court and/or the Bankruptcy Trustee.

Second Factor, whether the lawyer acted intentionally, knowingly, or negligently: Most of Attorney White's actions resulting in findings of professional ethics violations were negligent. However, (1) when Attorney White became aware that clients were attempting to communicate with him seeking the return of funds in Counts I and II, he knowingly avoided communication with the clients until Grievance Commission actions were filed; (2) Attorney White knowingly underreported his retainer in Count IV so he could have the funds available to spend in his operating account rather than, as would have been required prior to Bankruptcy Court approval, keeping the funds in his trust account; and (3) Attorney White intentionally made a false statement to the Court with regard to the purpose for which he was retained in Count II.

Third factor, the amount of the actual or potential injury caused by the lawyer's misconduct: In two instances, Counts I and II, the clients were injured by Attorney White's failure to do the work for which he was retained, and they suffered some undefinable loss as result of his delay in returning the funds that should have been repaid to the clients. However, overall, these injuries were not significant. There could have been potential injury to creditors in the

bankruptcy proceeding addressed in Count IV as a result of the underreporting of Attorney White's agreed retainer. This underreporting could have harmed the creditors by leaving those creditors unaware of the larger amount of funds available to the bankrupt client that White intended to use as a retainer, without approval of the Bankruptcy Court. However, evidence of actual injury as opposed to potential injury in this area is limited.

Fourth factor, existence of aggravating or mitigating factors: As a significant aggravating factor, the Court notes a continuing practice of poor administrative and financial management of Attorney White's practice which led to several of the ethical violations. The Court must emphasize that this poor management of practice, listed as an aggravating factor, is not, in effect, double counting the several ethical violations already found. It does recognize that Attorney White disregarded the warnings in GCF No. 11-148 and GCF No. 14-152 that improvement of his practice management was needed. Instead, Attorney White betrayed the Grievance Commission's trust that "the misconduct is unlikely to be repeated." These aggravating factors are in addition to the findings of ethical violations, such as the false statement to this Court, which are not double counted as aggravating factors.

Looking to mitigating factors, Attorney White's counsel argues that Attorney White has provided services at reasonable cost to some clients,

particularly in bankruptcy matters, who, except for Attorney White's willingness to provide services at a relatively reasonable cost, might not have been able to have the services of a lawyer at all. Making services available at reasonable fees is important to serve part of the Maine public that needs to be served, and the Court accepts the representation that Attorney White has provided some of his services for clients who might otherwise not be able to be served by a lawyer. The Court considers this a mitigating factor.

Addressing the totality of the violations, the Court notes that the Board is asking for at least a two-year suspension, with all but some time in excess of six months of the suspension to be suspended and Attorney White to be placed on probation with his practice monitored and supervised during the probationary period. An actual suspension in excess of six months is requested so that Attorney White must demonstrate improvement in his practice management and get court approval prior to being reinstated to the practice of law. *See* Bar Rule 29(a).

Viewed in the context of this case, the recommended two-year overall suspension may sound reasonable. However, the Court must consider sanctions imposed in comparative cases, if comparative cases exist. In *In re Nadeau*, 2017 ME 121, 168 A.3d 746, the Supreme Judicial Court imposed a suspension of two years for a much more serious combination of present and

past ethical violations.[2] With the *Nadeau* case sanction as a comparative sanction guide, it is difficult to justify imposing an overall two-year suspension here.

Respecting the Board's recommendation, the Court is also concerned that because of Attorney White's apparently limited resources, there would not be adequate support to pay a reasonable rate for a monitor for Attorney White's practice, as the Board suggested. The Court is unwilling to solicit any attorney to essentially do Attorney White's practice management work for him without pay. If he wants to be reinstated, Attorney White will have to reorganize and improve his practice management on his own.

In this case, the Court determines that it must impose a sanction that includes a suspension sufficiently long that Attorney White will have to petition for reinstatement and thus be able to demonstrate to the Board, and any reviewing court, that he has made the changes necessary to avoid the problems that led to the many ethical violations in this matter and those found in GCF No. 14-152 and GCF No. 11-148. Accordingly, the Court determines that an actual suspension from the practice of law for nine months will be imposed.

---

[2] In a subsequent case involving an additional violation of the Code of Judicial Conduct, *In re Nadeau*, 2018 ME 18, 178 A.3d 495, the Court imposed a reprimand.

To give Attorney White time to provide the required notices, Bar Rule 31, and disengage from his practice, that suspension will run from November 19, 2018, to September 16, 2019.

The Court does not suspend any of the suspension and does not place Attorney White on any probation. Upon petitioning for reinstatement, it will up to Attorney White to demonstrate that he has adequately addressed the problems that led to this suspension.

A copy of this order shall be provided to the Offices of the United States Bankruptcy Court and the Offices of the United States Trustee in Portland and Bangor.

Therefore, the Court ORDERS:

> On Count III, the Court issues a Public Reprimand.
> On Counts I, II, and IV, the Court imposes a nine-month suspension from the practice of law, subject to the terms and conditions of this Order.

Dated: October 3, 2018

Donald G. Alexander
Associate Justice