AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference & Consumer Forum

Ethics: What Happens When Our Clients Are Less than Forthcoming/ Don't Tell the Truth

PLENARY SESSION

Hon. Peter G. Cary
U.S. Bankruptcy Court (D. Maine) | Portland

Keri W. Costello
Sullivan & Worcester | New York

Pamela A. Harbeson
Office of Bar Counsel | Boston

Andrew C. Helman
Dentons | Portland, Maine

2024

Ethical Rules To Consider When Your Client Lies

Presented by:
Hon. Peter G. Cary, U.S. Bankruptcy Court (D. Me.)
Keri Wintle Costello, Esq.
Pamela A. Harbeson, Esq.
Andrew C. Helman, Esq.

Hypothetical

- On Monday, Attorney received a call from Avery, one of two members of A2Z LLC, a member-managed LLC. Avery told Attorney that A2Z owned two pieces of real estate –a VRBO rental located in Athol, Massachusetts, and a partially developed project located in Everett, Massachusetts, at which A2Z intends (in the future) to provide services in addition to owning the property.
- Avery also told Attorney that a foreclosure sale of the Athol property was scheduled for Friday morning by Quabbin Community Bank, the holder of the first, and only, mortgage on that property. Avery also told Attorney that a default was imminent on a loan secured by the Everett property.

Hypothetical

- Attorney scheduled an appointment for Avery and her business partner, Zephyr, to meet with Attorney and Paralegal on Tuesday morning. Attorney also sent Avery an e-mail enclosing a bankruptcy questionnaire and a retainer agreement.
- On Tuesday morning, only Avery appeared at Attorney's office and delivered the completed questionnaire, the signed retainer agreement, and cash payment of the bankruptcy retainer.
- Attorney and Paralegal reviewed the questionnaire with Avery. Other than the real estate, Avery indicated that the only other meaningful asset that A2Z owned was a lender liability claim against Quabbin Community Bank. The questionnaire also indicated that A2Z's liabilities totaled $3 million, just below the revised debt limits for subchapter V.

Hypothetical

- After Avery left, Paralegal confirmed with the applicable registries of deeds on masslandrecords.com that the Athol and Everett properties were owned by A2Z.
- Attorney emailed the completed petition and schedules, as well as a bankruptcy resolution and first day declaration authenticating the resolution for Avery to review.
- Wednesday afternoon Avery came to Attorney's office and dropped off the fully signed petition, schedules, declaration, and bankruptcy resolution and told Attorney that Zephyr was "on board" and Attorney should commence the case ASAP before the Friday auction.
- Attorney filed the case on Thursday.

Hypothetical

- At the meeting of the creditors one month later, Avery appeared as A2Z's representative. Also, a representative from Quabbin Community Bank asked why the Everett property had been transferred to A2Z two months earlier and why a mortgage in favor of Zephyr securing $500,000 had been released at the time of the transfer.
- Immediately after the meeting, Avery told Attorney that (a) Zephyr never executed the bankruptcy resolution, (b) Zephyr had convinced Avery to transfer the Everett property to A2Z, (c) Zephyr had also convinced Avery to have A2Z issue new membership units to Zephyr in satisfaction of Zephyr's $500,000 promissory note, and (d) Zephyr said this would mean A2Z could file as a subchapter V debtor and would get better treatment in bankruptcy.

Hypothetical

- The day after the meeting of the creditors, at the Attorney's insistence, Avery and Zephyr meet with Attorney and Paralegal. In their presence, Zephyr executes the bankruptcy resolution.
- Attorney informs Avery and Zephyr that he plans to prepare an amended "first day declaration" to reflect Zephyr's post-petition signing of the bankruptcy resolution and to disclose the debt-for-equity swap. Attorney also requests that Avery sign an amended statement of financial affairs indicating that A2Z issued membership units to Zephyr shortly before the bankruptcy filing. They urge him not to do so because "all's good now" and "we don't want to draw any extra attention to our case."

Poll Questions

How to Use Polling Wi-Fi: Sea_Crest

1. Take out your preferred mobile device (phone, iPad, e-reader)
2. Open up your web browser and type in poll.abi.org
3. Click on the ”Polling Session: Ethics” session
4. When prompted by the moderator, open up each poll question and vote

Has something similar ever happen to you?

- A. Yes
- B. No

What should Attorney do?

- A. Nothing - the "shortcomings" have been addressed.
- B. Withdraw – Avery and Zephyr are bad actors and Attorney should ditch them ASAP.
- C. Withdraw – but Attorney must take remedial action to address Avery and Zephyr's actions and to comply with Attorney's ethical obligations.
- D. Continue representation - but Attorney must take remedial action to address Avery and Zephyr's actions and to comply with Attorney's ethical obligations.
- E. Continue representation but get a bigger retainer.

Relevant Rules of Professional Conduct

Pamela A. Harbeson, Esq.
Assistant Bar Counsel
Office of Bar Counsel
One Beacon Street, 10th Floor
Boston, MA 02110
617-728-8750
p.Harbeson@massbbo.org

Preventing Fraud

- ABA Model Rule 1.2: Scope of Representation

  (d) – A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent….

  - Adopted by MA, NH, VT – 1.2(d); ME – 1.2(e); RI – 1.2(c)

- ABA Model Rule 3.1: Meritorious Claims & Contentions

  A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

  - Adopted by MA, NH (incarceration *or institutionalization*); ME, RI, VT

Preventing Fraud (cont'd)

- ABA Model Rule 3.4: Fairness to Opposing Party & Counsel

  A lawyer shall not:

  (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

  (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law; ….

  - Adopted by MA, NH, ME, RI, VT

- ABA Model Rule 4.1: Truthfulness in Statements to Others

  In the course of representing a client a lawyer shall not knowingly:

  (a) make a false statement of material fact or law to a third person; or

  (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

  - Adopted by MA, NH, ME, RI, VT

Preventing Fraud (cont'd)

- ABA Model Rule 8.4: Misconduct

  It is professional misconduct for a lawyer to:

  (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

  (d) Engage in conduct that is prejudicial to the administration of justice;

  - Adopted by MA, ME, RI, VT
  - NH has not adopted 8.4(d)

Disclosing Fraud

- ABA Model Rule 3.3: Candor Toward the Tribunal

  (a) A lawyer shall not knowingly:

  (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

  (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

  (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

  (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

  (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

  (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Disclosing Fraud (cont'd)

- Adopted by MA (w/ additional Rule 3.3(e) regarding representation of a criminal defendant)
- Adopted by ME (except 3.3(a)(2) which states "A lawyer shall not knowingly: (2) misquote to a tribunal the language of a book, statute, ordinance, rule or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute, ordinance or rule that has been repealed or declared unconstitutional)
- Adopted by NH (except reverses order of (c) and (d)
- Adopted by RI and VT

Client Confidences

- ABA Model Rule 1.6(a) - A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
    - MA – Adopted, but w/ definition:"'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the legal community or in the trade, field, or profession to which the information relates)
    - ME – "1.6(a) A lawyer shall not reveal a confidence or secret of a client unless, (i) the client gives informed consent; (ii) the lawyer reasonably believes that disclosure is authorized in order to carry out the representation; or (iii) the disclosure is permitted by paragraph (b)".
    - Adopted by NH
    - RI – "1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
    - VT – "1.6 (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c).

Exceptions to Confidentiality

- ABA Model Rule 1.6(b): A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

  (1) to prevent reasonably certain death or substantial bodily harm;

  (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services....

Fraud Exceptions to Confidentiality – State Glosses

- MA –1.6(b) "A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

  (1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;

  (2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;

  (3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; ...."

- NH - 1.6(b) "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

  (1) to prevent reasonably certain death or substantial bodily harm or to prevent a client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; ...."

- ME – 1.6(b) "A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:

  (1) to prevent reasonably certain substantial bodily harm or death;

  (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; ...."

Fraud Exceptions to Confidentiality – State Glosses (cont'd)

- RI – 1.6(b) **"**A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

  (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; ...."

- VT – 1.6 "(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

  (1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act; or

  (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; or

  (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

  (c) A lawyer may reveal information relating to the representation of a client, though disclosure is not required by paragraph (b), when permitted under these rules or required by another provision of law or by court order or when the lawyer reasonably believes that disclosure is necessary:

  (1) to prevent the client from committing a crime in circumstances other than those in which disclosure is required by paragraph (b) or to prevent the client or another person from committing an act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, the person committing the act; ...."

Withdrawal

- ABA Model Rule 1.16: Declining or Terminating Representation

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law; ... or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud; ....

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Withdrawal (cont'd)

- MA – new proposed rule 1.16 -

(a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation.

(b) Except as stated in paragraph (d), a lawyer shall not represent a client in a matter or, where representation has commenced, shall withdraw from the representation if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(4) the lawyer knows that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud; ....

(d) If permission for withdrawal from the representation is required by the rules of a tribunal, a lawyer shall not withdraw from the representation in a proceeding before that tribunal without its permission.

(e) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for engagement of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred.

Withdrawal (cont'd)

- NH, ME, RI, VT – 1.16(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law; ....

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud ....

Relevant Bankruptcy Rules and Code Sections

Keri Wintle Costello, Esq.
Sullivan & Worcester LLP
1251 Avenue of the Americas
kcostello@sullivanlaw.com

Bankruptcy Rule 9011
Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Bankruptcy Rule 9011
Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Bankruptcy Rule 9011
Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) ***How Initiated.***

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Bankruptcy Rule 9011
Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers (cont'd)

(2) ***Nature of Sanctions; Limitations.*** A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) ***Order.*** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) Verification. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(f) Copies of Signed or Verified Papers. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Dismissal of a case or conversion to a case under chapter 11 or 13
Bankruptcy Code Section 707(b)(4)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court find that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

Dismissal of a case or conversion to a case under chapter 11 or 13 Bankruptcy Code Section 707(b)(4) (cont'd)

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

Bankruptcy Crimes from Non- or Improper Disclosure

Andrew Helman, Esq.
Dentons
andrew.helman@dentons.com

Bankruptcy Crimes
18 U.S. Code § 152 - Concealment of assets; false oaths and claims; bribery

Section 152 is a broadly drafted statute creating nine separate crimes by a person who:

(1) **knowingly and fraudulently** conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) **knowingly and fraudulently** makes a false oath or account in or in relation to any case under title 11;

(3) **knowingly and fraudulently** makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) **knowingly and fraudulently** presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) **knowingly and fraudulently** receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

Bankruptcy Crimes
18 U.S. Code § 152 - Concealment of assets; false oaths and claims; bribery

(6) **knowingly and fraudulently** gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, **in contemplation of a case under title 11** by or against the person or any other person or corporation, **or with intent to defeat the provisions of title 11, knowingly and fraudulently** transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 **or in contemplation thereof, knowingly and fraudulently** conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, **knowingly and fraudulently** withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

Bankruptcy Crimes
18 U.S. Code § 152 - Concealment of assets; false oaths and claims; bribery

Section 152 addresses "*all possible methods* by which a bankruptcy or *any other person* may attempt to defeat the Bankruptcy Act through an effort to keep assets from being equitably distributed among creditors." *Stegeman v. United States*, 425 F.2d 984, 986 (9th Cir.), *cert. denied*, 400 U.S. 837 (1970)(citation omitted; emphasis in original).

While each subsection of section 152 can be a separate crime – and each requires proof of different facts – the First Circuit has held that it not appropriate to obtain multiple convictions for violation of different subsections. *See United States v. Ambrosiani*, 610 F.2d 65 (1st Cir. 1979), *cert. denied*, 445 U.S. 930 (1980).

Key terms:

"knowingly and fraudulently"

"in contemplation of bankruptcy"

Bankruptcy Crimes
18 U.S. Code § 157 - Bankruptcy fraud

A person who, having devised or intending to devise a **scheme or artifice to defraud** and **for the purpose of executing or concealing such a scheme or artifice or attempting** to do so—

(1) files a petition under title 11, including a fraudulent involuntary petition under section 303 of such title;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.

Bankruptcy Crimes
18 U.S.C. § 1519 - Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object **with the intent** to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States **or any case filed under title 11, or in relation to or contemplation of any such matter or case**, shall be fined under this title, imprisoned not more than 20 years, or both.

Take Aways

* Read (and then reread) the Relevant Professional Conduct Rules
* Conduct Due Diligence
    * Pacer – CM/ECF
    * Registry of Deeds
    * Secretary of State - Organizational documents; U.C.C.
* Communicate Clearly with Clients
    * Memorialize key aspects of your representation through communications with the client
    * Don't "practice law" through texts
* Use Ethics Hotlines
* Visit State Ethics Websites
* Beware of title 18 and potential conflicts between civil and criminal objectives

ABI Northeast Bankruptcy Conference & Consumer Forum

Title: Ethical Rules to Consider When your Client Lies (or is "not forthcoming").

Wednesday, July 10, 2024 8:00 AM – 9:15 AM

Panel:

Peter G. Cary	Judge	U.S. Bankruptcy Court (D. ME)
Keri Wintle Costello, Esq.	Counsel	Sullivan & Worcester LLP, New York, NY
Pamela A. Harbeson, Esq.	Ass't Bar Counsel	Office of Bar Counsel, Boston, MA
Andrew C. Helman, Esq.	Partner	Dentons, Portland, ME

Description:

Some things in life are crystal clear; others are amorphous. When your client is untruthful during the bankruptcy process, you, as counsel, must do certain things. This Panel will identify the relevant Bar Rules, Codes of Professional Conduct, Bankruptcy Code sections, Bankruptcy Rules of Procedures, and other authorities that will help practitioners identify troublesome situations and implement solutions.

Materials:

- Slide deck addressing ethical rules, Bankruptcy Rule 9011 and related issues, and bankruptcy crimes under title 18
- Certain relevant cases (*In re Withrow*, *Matter of Suprenant*, *Matter of Hayes*)

Cases Pertaining to

Ethical Rules to Consider When your Client Lies (or is “not forthcoming”)

Lafayette v. Collins (In re Withrow)

United States Bankruptcy Appellate Panel for the First Circuit

May 26, 2009, Decided

BAP NO. MW 08-055

Reporter
405 B.R. 505 *; 2009 Bankr. LEXIS 1295 **

DARYL WITHROW, Debtor. FRANCIS LAFAYETTE, Appellant, v. JOSEPH B. COLLINS, Chapter 7 Trustee, and PHOEBE MORSE, United States Trustee, Appellees.

Prior History: [1]** Appeal from the United States Bankruptcy Court for the District of Massachusetts. Bankruptcy Case No. 07-41243-HJB. Hon. Henry J. Boroff, U.S. Bankruptcy Judge.

Case Summary

Procedural Posture

A Chapter 7 debtor's attorney challenged an order of the United States Bankruptcy Court for the District of Massachusetts that imposed monetary sanctions against him for violating *Fed. R. Bankr. P. 9011* and *11 U.S.C.S. § 707(b)(4)(C)* and *(D)*, arguing that the alleged errors in the debtor's bankruptcy schedules, statement of financial affairs, and other documents were due to the debtor's memory failure rather than the attorney's actions.

Overview

There was evidence that the attorney had violated his obligations to conduct a reasonable inquiry into the facts set forth in the debtor's schedules, statement of financial affairs, and rebuttal before filing them where he admitted numerous errors and discrepancies, and his justification for the mistakes were not persuasive and failed to justify why the mistakes were made and why they were not corrected in a timely fashion. Even if the excuses that the debtor provided him with inaccurate information were true, they did not explain the numerous inconsistent statements as to the debtor's income, entitlement to overpay, and support obligations. They were not sufficient to overcome the sloppy and careless actions (or inactions) of the attorney. Thus, there was sufficient evidence to support the conclusion that the attorney violated his *11 U.S.C.S. § 707(b)(4)* and *Rule 9011* obligations. The sanctions amount was appropriate as it was designed to satisfy both purposes of deterrence and compensation, and the bankruptcy court had not ignored a material factor deserving significant weight, relied upon an improper factor, or made a serious mistake in weighing proper factors.

Outcome
The sanctions order was affirmed.

Counsel: Francis Lafayette, Pro se, on brief for Appellant.

Joseph B. Collins, Esq., on brief for Appellee, Joseph B. Collins, Chapter 7 Trustee.

Ramona D. Elliot, Esq., and P. Matthew Sutko, Esq., on brief for Appellee, Phoebe Morse, United States Trustee.

Judges: Before Vaughn, Kornreich, and Tester, United States Bankruptcy Appellate Panel Judges.

Opinion by: Tester

Opinion

[*508] Tester, U.S. Bankruptcy Appellate Panel Judge.

Francis Lafayette ("Attorney Lafayette") appeals from the bankruptcy court's order (the "Sanctions Order") imposing monetary sanctions against him for violating *Bankruptcy Rule 9011* and *§§ 707(b)(4)(C)* and *(D)*. [1] Attorney Lafayette argues that the alleged errors in the

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to **[**2]** the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, *11 U.S.C. §§ 101, et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

Debtor's bankruptcy schedules, statement of financial affairs, and other documents were due to the Debtor's "memory failure" rather than his own actions (or inactions), and, therefore, he did not violate *Bankruptcy Rule 9011*. For the reasons set forth below, we **AFFIRM**.

BACKGROUND

Attorney Lafayette filed a skeleton chapter 13 petition on behalf of the debtor, Daryl Withrow (the "Debtor"). Less than two weeks later, the Debtor converted his case to chapter 7. Thereafter, he filed the Debtor's schedules, statement of financial affairs, and Official Form B 22A. He also filed the Debtor's Rebuttal of Presumption of Abuse (the "Rebuttal"), wherein the Debtor sought to counteract the presumption of abuse otherwise suggested by the calculations on Form B 22A and preserve his discharge due to "special circumstances." Specifically, the Debtor noted that his average monthly income of $ 5,333.33 (as set forth on Form B 22A) was based on overtime that he no longer received, and that his actual average monthly income was $ 4,000.00. In addition, the Debtor claimed that he now needed to provide monthly support of $ 100 to his mother due to a stroke she suffered after the filing of the Debtor's **[**3]** Chapter 13 case.

The chapter 7 trustee (the "Trustee") filed a response to the Rebuttal (the "Rebuttal Response"), asserting that the Rebuttal was "false and misleading" for several reasons. First, the Trustee noted that the Debtor's Form B 22A did not list average monthly income of $ 5,333.33; rather, the average monthly income actually reported was $ 4,834.22. Second, recent pay stubs for postpetition work revealed that the Debtor was still receiving overtime pay. Third, the Trustee claimed that the Debtor's mother suffered a stroke *prior* to and not *after* the filing of his case.

Thereafter, Attorney Lafayette filed an interim application for compensation (the "Fee Application"), requesting professional fees of $ 1,195.00. [2] The Trustee objected. After repeating the concerns set forth in his Rebuttal Response, the Trustee asserted that because the Debtor testified at the § 341 meeting that he had "fully and truthfully" informed Attorney Lafayette of the facts and circumstances related to the schedules, statement of financial affairs, and the Rebuttal, the Trustee concluded that any errors were Attorney Lafayette's fault, and, therefore, the compensation should be denied. The U.S. Trustee **[**4]** also objected to Attorney Lafayette's Fee Application, adopting the reasons proffered by the Trustee.

[*509] The Debtor filed an affidavit seeking to clarify the discrepancies raised by the Trustee in his objection to the Fee Application. Among other things, the Debtor stated that his failure to list all of his bank accounts on his schedules and statement of financial affairs was due to his own forgetfulness. He also restated his commitment to provide financial support to his mother.

At a hearing on the Fee Application, the Trustee and Attorney Lafayette proposed a "settlement" in which Attorney Lafayette would pay the Trustee $ 1,000.00 to compensate him for time and expenses incurred due to Attorney Lafayette's errors in this case. The U.S. Trustee did not object to the proposed settlement. The bankruptcy court did not approve the settlement, however, suggesting that a *Bankruptcy Rule 9011* sanction might be more appropriate. Attorney Lafayette objected to the imposition of a sanction and requested an **[**5]** evidentiary hearing on the matter. The bankruptcy court then entered a show cause order ("Show Cause Order") to provide Attorney Lafayette with the evidentiary hearing he requested.

In the meantime, the Trustee filed an affidavit citing additional concerns with the Debtor's schedules and statement of financial affairs. Among other things, he noted that the Debtor's schedules failed to exempt the equity in either the Debtor's residence or his automobile, and that although Attorney Lafayette promised at the § 341 meeting to amend the schedules, he had not done so. In addition, the Trustee restated his concerns about the discrepancies between the Debtor's schedules, statement of financial affairs and his testimony at the § 341 meeting regarding his mother, his income and his overtime pay.

In a responsive affidavit ("Response Affidavit"), the Debtor claimed, among other things, that his schedules had been amended to accurately reflect the true value of his residence and vehicle. [3] He also continued to deny that he received overtime pay, and stated, for the first time, that certain medication caused him to make

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[2] Attorney Lafayette is required to file fee applications in all cases in the District of Massachusetts in which he represents debtors. See *In re LaFrance, 311 B.R. 1, 25 (Bankr. D. Mass. 2004)*.

[3] In fact, the Debtor had not yet filed his amended **[**6]** schedules and would not do so for two more days.

mistakes when answering questions.

Three days later, the bankruptcy court held an evidentiary hearing as set forth in the Show Cause Order. At the hearing, Attorney Lafayette admitted that the schedules were erroneous because they did not include an exemption for the Debtor's residence or his vehicle, that he told the Trustee at the § 341 meeting that he intended to amend the schedules, and that he helped the Debtor prepare his Response Affidavit which stated that the amended schedules had been filed when, in fact, they were not filed until *after* the filing of the Debtor's Response Affidavit. Attorney Lafayette also testified that the omission of open or recently closed bank accounts on the schedules and statement of financial affairs was due to the Debtor's forgetfulness, which he claims was justified because the accounts had minimal balances.

When questioned about discrepancies between the Debtor's Rebuttal and his actual Form B 22A regarding the Debtor's average current monthly income, Attorney Lafayette admitted that he had made a mistake, but was unable to explain why or elaborate further. In addition, when questioned about discrepancies between the Debtor's Schedule **[**7]** J, which provided that the Debtor had no reason to anticipate a reduction in income, and his Rebuttal, which provided that the Debtor would **[*510]** have less income due to support provided to his mother, Attorney Lafayette testified that the omission was due to the fact that the Debtor did not provide monetary support to his mother at the start of the case. This testimony, however, was inconsistent with the Debtor's affidavit wherein he stated that he began providing support to his mother months before filing his case.

On July 3, 2008, the bankruptcy court issued a Memorandum of Decision concluding that Attorney Lafayette had violated *§ 707(b)(4)(C)* and *Bankruptcy Rule 9011* in his preparation of the Debtor's schedules, statement of financial affairs and the Rebuttal. [4] The bankruptcy court stated:

> On the facts here, this Court can not find that Attorney Lafayette has met his *Rule 9011* and *§ 707(b)(4)(C)* obligations. After all of the argument and testimony, the Court still is not sure what the Debtor earned in the six months prior to the filing of the petition or what the Debtor earns now. Nor is the Court sure whether the Debtor intended to mislead the Court with respect to the information provided **[**8]** in his bankruptcy papers or his *Section 341* meeting testimony. But the Court is sure of this - that Attorney Lafayette, at the very least, failed to (1) properly review information provided by the Debtor with respect to his prepetition income; (2) identify contradictions and inconsistencies in the schedules, Statement of Financial Affairs, Rebuttal and affidavits submitted on behalf of the Debtor before the filing of those documents; (3) promptly correct those contradictions and inconsistencies, even when identified by the Chapter 7 Trustee, on anything close to a timely basis; and (4) to place himself in a position of being able to explain the reasons for those contradictions and inconsistencies to the Court even in the context of an evidentiary hearing of which he had more than adequate notice. Certainly, there is no bright line that surrounds *§ 707(b)(4)(C)* and *(D)* and *Rule 9011*. But wherever that line lies, this Court agrees with the Chapter 7 Trustee and the UST that Attorney Lafayette has crossed it.

Withrow, 391 B.R. at 229. Based on these findings, the bankruptcy court entered the Sanctions Order directing Attorney Lafayette to pay the Trustee the sum of $ 3,585.00 as sanctions. **[**9]** This appeal followed. [5] Although Attorney Lafayette sought a stay pending appeal of the Sanctions Order, his request was denied.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See *Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998)*. The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. *28 U.S.C. §*

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[4] The bankruptcy court's Memorandum of Decision is published. See *In re Withrow, 391 B.R. 217 (Bankr. D. Mass. 2008)*.

[5] On July 14, 2008, Attorney Lafayette filed a "Notice of Appeal to the District Court." App. at 44. However, he failed to file a separate statement of election to appeal to the district court, as required by *Fed. R. Bankr. P. 8001(e)* and *28 U.S.C. § 158(c)(1)*. Consequently, the Panel denied the transfer of the appeal to the district court.

158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the **[**10]** litigation on the merits and leaves nothing for the court **[*511]** to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy court's order imposing sanctions under Bankruptcy Rule 9011 is a final, appealable order where, as here, it resolves all of the issues pertaining to a discrete claim. See White v. Burdick (In re CK Liquidation Corp.), 321 B.R. 355, 361 (B.A.P. 1st Cir. 2005) (citing 10 Lawrence P. King, Collier on Bankruptcy, P 9011.10 (15th ed. rev. 2004)); see also Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553, 558 (1st Cir. 1986); Caterpillar Fin. Servs. Corp. v. Braunstein (In re Henriquez), 261 B.R. 67, 70 (B.A.P. 1st Cir. 2001).

STANDARD OF REVIEW

The Panel generally reviews findings of fact for clear error and conclusions of law *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719 n.8 (1st Cir. 1994). **[**11]** The Panel reviews the bankruptcy court's decision to impose sanctions under Bankruptcy Rule 9011 for manifest abuse of discretion. See CK Liquidation, 321 B.R. at 361 (citations omitted). An abuse of discretion occurs when the court ignores a material factor deserving significant weight, relies upon an improper factor, or makes a serious mistake in weighing proper factors. See id. (citing Colon v. Rivera (In re Colon), 265 B.R. 639 (B.A.P. 1st Cir. 2001)).

DISCUSSION

I. Violations of Bankruptcy Rule 9011 and § 707(b)(4)

Pursuant to Bankruptcy Rule 9011(b), an attorney or *pro se* party who presents a document (whether by signing, filing, submitting, or later advocating) certifies, among other things, that "the allegations and other factual contentions have evidentiary support, or if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Bankr. P. 9011(b). [6] In addition, under new §§ 707(b)(4)(C) and (D) (as revised by BAPCPA), a debtor's attorney has a duty, equivalent to that under Bankruptcy Rule 9011, to perform a reasonable investigation into the circumstances giving rise to the documents before **[**12]** filing them in a chapter 7 case. [7] For example, under new § 707(b)(4)(C), attorneys are subject to an automatic certification of meritoriousness, based upon a reasonable investigation, as to any "petition, pleading, or written motion" signed by them. See 11 U.S.C. § 707(b)(4)(C). [8] Furthermore, under new § 707(b)(4)(D), **[*512]** an attorney's signature on a client's bankruptcy petition is deemed a representation that "the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." See

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[6] Rule 9011(b) **[**13]** is not limited to statements below which appear an attorney's signature. Rather, the rule provides that filing, submitting or even advocating with respect to a document filed with a court has the same effect as signing the document. Therefore, it is well established that Bankruptcy Rule 9011(b) applies to debtors' attorneys even with respect to a debtor's schedules, statement of affairs and other documents disclosing assets, which debtors, but not counsel, are required to sign. See, e.g., In re M.A.S. Realty Corp., 326 B.R. 31, 38 (Bankr. D. Mass. 2005).

[7] Although this case was commenced under chapter 13, the schedules, statements and Form B 22A were completed after the conversion to chapter 7. Thus the provisions of chapter 7, including section 707, are applicable. See 11 U.S.C. § 103(b).

[8] Section 707(b)(4)(C) provides, in relevant part:

> The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has--
>
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion--
>
> (I) is well grounded in fact; and
>
> (II) **[**14]** is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

11 U.S.C. § 707(b)(4)(C).

11 U.S.C. § 707(b)(4)(D). [9] One court, though critical of the wording of § 707(b)(4), stated that the legislature made its point explicitly:

> [T]heir general drift is clear: debtors' counsel are to exercise significant care as to the completeness and accuracy of *all* recitations on their clients schedules, after they have made a factual investigation and legal evaluation that conforms to the standards applicable to any attorney filing a pleading, motion, or other document in a federal court. The content of a debtor's petition and schedules is relied on, and should have the quality to merit that reliance.

In re Robertson, 370 B.R. 804, 809 n.8 (Bankr. D. Minn. 2007).

Accordingly, any attorney who files schedules and statements on a debtor's behalf makes a certification regarding the representations contained therein. Although the certification is not an absolute guaranty of accuracy, it must be based upon the attorney's best knowledge, information and belief, "formed after an inquiry reasonable under the circumstances." Nosek v. Ameriquest Mortg. Co. (In re Nosek), 386 B.R. 374, 381 (Bankr. D. Mass. 2008). The First Circuit has held that the standard to be applied is "an objective standard of reasonableness under the circumstances." Id. (quoting Cruz v. Savage, 896 F.2d 626, 631 (1st Cir. 1990)). "Courts, therefore, must inquiry as to whether 'a reasonable attorney in like circumstances could believe **[**15]** his actions to be factually and legally justified.'" Id. (quoting Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987)).

Thus, Attorney Lafayette had an affirmative duty to conduct a reasonable inquiry into the facts set forth in the Debtor's schedules, statement of financial affairs and Rebuttal before filing them. There is evidence in the record, however, that Attorney Lafayette violated that obligation. It is undisputed that there were numerous errors and discrepancies in the documents filed by Attorney Lafayette on the Debtor's behalf. In fact, Attorney Lafayette admitted as much at the show cause hearing. For example, he conceded error regarding the inconsistent treatment of current monthly income on the Debtor's Rebuttal (which reflected that the Debtor's average current monthly income as set forth on Form B 22A was $ 5,333.33), and the Debtor's actual Form B 22A (which reflected $ 4,834.22 in current monthly income). In addition, there were discrepancies between the Debtor's Rebuttal (which listed actual monthly income without overtime pay in the amount of $ 4,000) and the Debtor's Schedule I (which listed actual monthly income without overtime pay in **[*513]** the amount of $ 3,309.73). **[**16]** There were also differences between the Debtor's Rebuttal (wherein he indicated that he anticipated that he would have to assist his mother financially for an indefinite period of time after the filing of his case) and his Schedule J (wherein he stated that he did not reasonably anticipate a significant increase or decrease in expenses in the upcoming year). There were also inconsistencies regarding whether the Debtor was actually receiving overtime and the frequency and extent of financial support being provided to his mother.

Although Attorney Lafayette conceded that there were numerous mistakes in the documents he filed on the Debtor's behalf, he blames the errors on his personal health issues and/or his client's faulty memory. He claims that the inconsistencies in the documents were not attributable to him, but were the fault of his client, stating: "The debtor got in the way of the process of the preparation of the documents with his mental condition" and his "personal forgetfulness." Attorney Lafayette's excuses are not persuasive and fail to justify why the mistakes were made and why they were not corrected in a timely fashion. Even if his excuses that the Debtor provided him **[**17]** with inaccurate information are true, they do not explain the numerous inconsistent statements in the various documents regarding the Debtor's income, entitlement to overpay and his support obligations to his mother. They are not sufficient to overcome the sloppy and careless actions (or inactions) of Attorney Lafayette in this case. Therefore, the evidence shows that Attorney Lafayette failed to conduct a reasonable investigation into the underlying facts before filing the Debtor's schedules, statement of financial affairs and Rebuttal, and that he was careless when preparing the documents. In addition, Attorney Lafayette fails to recognize that he had a duty to conduct a reasonable inquiry into the underlying facts before filing the documents, and that if he had done so, many, if not all, of the inconsistencies could have been prevented.

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[9] Section 707(b)(4)(D) provides:

> The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

11 U.S.C. § 707(b)(4)(D).

Based on the foregoing, the Panel concludes that there is sufficient evidence in the record to support the bankruptcy court's conclusion that Attorney Lafayette violated his § 707(b)(4) and Bankruptcy Rule 9011 obligations.

II. Imposition of Sanctions Under Bankruptcy Rule 9011 and § 707(b)(4)

Pursuant to Bankruptcy Rule 9011(c), if, after notice and **[**18]** an opportunity to respond, the bankruptcy court determines that an attorney has violated Bankruptcy Rule 9011(b), it may impose "an appropriate sanction." See Fed. R. Bankr. P. 9011(c). In addition, § 707(b)(4) provides authority for bankruptcy courts to order the attorney for the debtor to reimburse the trustee for reasonable costs in prosecuting a § 707(b) motion brought by the trustee if the court grants the motion and "finds that the action of the attorney for the debtor in filing a case under this chapter violated [Bankruptcy R]ule 9011." 11 U.S.C. § 707(b)(4)(A). As the Robertson court noted:

> Though this new verbiage [of § 707(b)] has no directly-associated enforcement mechanism, § 707(b) now contains a basis in statute for the bankruptcy court to impose sanctions. These can take the form of "all reasonable costs" incurred by a successful movant under § 707(b), where "the action of the attorney for the debtor in filing a case under [the Bankruptcy Code] violated rule 9011 of the Federal Rules of Bankruptcy Procedure." 11 U.S.C. § 707(b)(4)(A)(i) - (ii). It also provides for "the assessment of an appropriate civil penalty against the **[*514]** attorney for the debtor," § 707(b)(4)(B)(i), **[**19]** payable to the trustee or the UST, § 707(b)(4)(B)(ii), if "the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure," 11 U.S.C. § 707(b)(4) (prefatory language).

Robertson, 370 B.R. at 809 n.8.

The bankruptcy court has discretion to determine what sanctions are appropriate under the circumstances when there has been a violation of Bankruptcy Rule 9011. In re Thomson, 329 B.R. 359, 362 (Bankr. D. Mass. 2005). The bankruptcy court usually considers several factors in determining whether to impose a sanction and what type of sanction to impose, including:

> whether the conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law, what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and what amount is needed to deter similar activity **[**20]** by other litigants.

Id. (citing CK Liquidation, 321 B.R. at 362). This is not an exhaustive list of the factors that the bankruptcy court may consider. Id.

Sanctions are meant to serve the dual purposes of deterrence and compensation under Bankruptcy Rule 9011, and must be designed to satisfy both purposes. Id. (citing 1095 Commonwealth Corp. v. Citizens Bank of Mass. (In re 1095 Commonwealth Corp.), 236 B.R. 530, 538 (D. Mass. 1999)). In cases of deterrence, the court must limit the sanction "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Id. (citing Fed. R. Bankr. P. 9011(c)(2)). In cases of compensation, the reasonable costs incurred as a result of the sanctionable conduct may appropriately form the sanction. Id. (citations omitted).

In reaching its decision to impose sanctions, the bankruptcy court noted that Attorney Lafayette has a history of "sloppy, careless and unprofessional" practices in representing consumer debtors. Withrow, 391 B.R. at 229 (citing In re LaFrance, 311 B.R. 1, 25 (Bankr. D. Mass. 2004)). In LaFrance, the bankruptcy court disallowed Attorney Lafayette's fee application and ordered him to disgorge **[**21]** those fees. The court further ordered that in all future cases in which he represented consumer debtors, Attorney Lafayette was required to deposit all client compensation in his client trust account and not withdraw funds unless the court allowed his fee application. 311 B.R. at 25. However, despite the strict mandate of the LaFrance decision, many fee applications of Attorney Lafayette have been denied because he continued to provide poor quality services to his clients. See, e.g., In re LaClair, 360 B.R. 388 (Bankr. D. Mass. 2006). As a result, the bankruptcy court concluded that the sanctions imposed by LaFrance were not sufficient to meet the bankruptcy court's intended goal of deterring Attorney Lafayette's sloppy and careless representation of his clients.

Therefore, the bankruptcy court imposed sanctions against Attorney Lafayette in the amount of $ 3,585, representing three times the amount which he intended to charge his client.

Attorney Lafayette does not argue that the sanction amount is inappropriate. **[*515]** Rather, he argues that the bankruptcy court should not have imposed sanctions at all. However, the evidence supports the bankruptcy court's conclusion that Attorney Lafayette **[**22]** violated *Bankruptcy Rule 9011* and *§ 707(b)(4)(C)* and, therefore, sanctions were warranted. The sanctions amount imposed by the bankruptcy court appears to be appropriate as it is designed to satisfy both purposes of deterrence and compensation. Moreover, there is no evidence that in imposing the $ 3,585 sanction, the bankruptcy court ignored a material factor deserving significant weight, relied upon an improper factor, or made a serious mistake in weighing proper factors. See *CK Liquidation, 321 B.R. at 366* (citing *Colon, 265 B.R. at 639*).

Under the circumstances, there is no evidence that the bankruptcy court abused its discretion in ordering sanctions against Attorney Lafayette in the amount of $ 3,585.

CONCLUSION

For the reasons set forth above, the Sanctions Order is **AFFIRMED**.

End of Document

DOUGLAS MICHAEL SURPRENANT
S.J.C. BD-2011-044

Order (six-month suspension) entered by Justice Duffly on September 6, 2011; Memorandum of Decision dated August 31, 2011

ORDER OF TERM SUSPENSION

This matter came before the Court, Duffly, J., on an Information and Record of Proceedings pursuant to S.J.C. Rule 4:01, sec. 8(6), with the Recommendation and the Vote of the Board of Bar Overseers filed by the Board on May 2, 2011. After a hearing held on July 6, 2011, attended by assistant bar counsel and the lawyer, and in accordance with the Memorandum of Decision dated August 31, 2011;

It is ORDERED that:

1. Douglas Michael Surprenant is hereby suspended from the practice of law in the Commonwealth of Massachusetts for a period of six months. In accordance with S.J.C. Rule 4:01, sec. 17 (3), the suspension shall be effective thirty days after the date of the entry of this Order. The lawyer, after the entry of this Order, shall not accept any new retainer or engage as a lawyer for another in any new case or legal matter of any nature. During the period between the entry date of this Order and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

It is FURTHER ORDERED that:

2. Within fourteen (14) days of the date of entry of this Order, the lawyer shall:

a) file a notice of withdrawal as of the effective date of the suspension with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2(c) and 2(d) of this Order, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign as of the effective date of the suspension all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching, to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2(d) of this Order, the place, of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been suspended; that he is disqualified from acting as a lawyer after the effective date of the suspension; and that, if not represented by, co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has been suspended and, as a consequence, is disqualified from acting as a lawyer after the effective date of the suspension;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by the Board.

3. Within twenty-one (21) days after the date of entry of this Order, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Order and with bar disciplinary rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Order any client, trust or fiduciary, funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession,

custody or control as of the entry date of this Order; or thereafter;

d) such proof of the proper distribution, of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other, state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records pf the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, Section 17.

4. Within twenty-one (21) days after, the entry date of this Order, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Order;

b) a list of all other state, federal and administrative jurisdictions, to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court, (Duffly, J.)
Maura S. Doyle, Clerk

Entered: September 6, 2011

MEMORANDUM OF DECISION

This matter comes before me on an information and record of proceedings and a vote of the Board of Bar Overseers (board) pursuant to S.J.C. Rule 4:01, § 8(4). The proceedings were initiated by a petition for discipline filed by bar counsel, and then assigned to a hearing committee. See S.J.C. Rule 4:01, § 8. Following an evidentiary hearing, the committee concluded that the respondent's conduct in: a) filing and signing a bankruptcy petition on the part of a husband and wife, without ever meeting or speaking with the husband; b) impersonating the husband during a telephone credit counseling session; c) signing a false certification on behalf of the husband stating that the husband had attended credit counseling; and d) signing his own name on a certificate stating that he had discussed different bankruptcy options with both husband and wife and had made the statutorily required disclosures to both of them, was in violation of Mass. R. Prof. C. 1.2 (a), 1.2 (d), 1.4 (a), 3.3 (a) (1), 4.1 (a), 4.1 (b), 8.4 (c), and 8.4 (d). The committee determined that the respondent had engaged in dishonesty and misrepresentation to a tribunal, and recommended that the respondent be suspended from the practice of law for nine months. Upon cross appeals by the respondent, and bar counsel, the board adapted the committee's findings of fact and conclusions, but determined that, given the mitigating circumstances in this case, a three-month suspension was appropriate.

While the respondent does not dispute the facts found by the board, at a hearing before me he suggested that a public reprimand would be a more appropriate sanction given the circumstances; bar counsel, by contrast, argued that the board erred in applying the factors in mitigation,

and that a longer suspension should be imposed. For the reasons discussed below, I conclude that the respondent's conduct violated the rules of professional conduct as determined by the board, and that a suspension of six months is the appropriate sanction in the circumstances.

Background. The following facts are from the hearing committee and the board's findings. The respondent was contacted initially by a potential client, the wife, who informed him that her house was to be foreclosed within a week.[1] The respondent scheduled a meeting with the wife and the husband; the wife came to the appointment alone. The wife told the respondent that she had been responsible for paying the mortgage on the family home, that she had failed to make timely payments, that she and her husband had been fighting over their financial situation, and that her husband wanted her to take care of the problem she had created and had authorized the filing of a joint petition for bankruptcy. Notwithstanding the wife's representations, the husband was unaware of the impending foreclosure and had had no discussions with the wife concerning; bankruptcy filing.

The respondent advised the wife to file an immediate petition for bankruptcy, and prepared the necessary documents. When he was unable to reach the husband by telephone during that initial meeting with the wife, the respondent participated the same day in a mandatory credit counseling session with the wife, representing during that session that he was the husband, in reliance on personal information supplied by the wife. The credit counseling session was a prerequisite to filing a bankruptcy petition;

[1] The potential client was referred by a business associate of the respondent.

certificates of completion were issued that day on behalf of the husband and the wife.

After the meeting, the wife took with her the documents prepared by the respondent for her husband to sign and return. She returned the next day with the documents purportedly signed by her husband, but in fact signed by her. The respondent filed the bankruptcy petition electronically on behalf of both husband and wife; he attached the husband's electronic signature to the petition, representing as the husband that the husband had undergone credit counseling and that the statements in the petition were true and correct; these assertions were made under the pains and penalties of perjury. The respondent certified also, under his own name, and falsely, that he had explained to both the husband and the wife their bankruptcy filing options, and that he had made mandatory disclosures to them.

After filing the petition, the respondent made repeated efforts to contact the husband at the telephone numbers supplied by the wife. The husband's business number, provided by the wife, was in reality the couple's home telephone number; the husband never received any messages from the respondent. When the bankruptcy trustee scheduled a creditor meeting for the couple, the respondent attempted unsuccessfully to contact the couple by telephone. After failing to receive any reply, he advised them by telephone message that he would not be attending the meeting, because he assumed that they would not be. He did not contact the bankruptcy trustee to attempt to reschedule the meeting.

On the day of the scheduled creditor meeting, the wife telephoned the respondent to say that she had gotten lost en route to the meeting, and that her husband would not be

attending; the respondent advised her that he would not be attending, but that she should go to the meeting, request a continuance, and telephone him afterwards. The wife did not attend the meeting and did not again contact the respondent.

Approximately a week after the scheduled meeting, the bankruptcy trustee moved to dismiss the petition because the couple had failed to make scheduled payments according to their chapter 13 bankruptcy plan. The respondent wrote to the couple, explaining the pending dismissal, and advising the couple that if the case were dismissed, they would become ineligible for further bankruptcy relief. He stated also that he would be willing to accept a reduced fee of less than half of the originally agreed upon $2,500 fee that he had negotiated with the wife; at the time he wrote the letter, the respondent had not been paid any portion of his fee. Neither the wife nor the husband responded, and the bankruptcy court dismissed the petition.

Shortly after the dismissal, the husband learned of the impending foreclosure, and learned subsequently from his wife of the dismissed bankruptcy petition. He hired separate counsel and moved to expunge his portion of the bankruptcy filing. When the respondent learned of the wife's falsehoods from the husband's attorney he admitted his role in the filings to the attorney and filed a response to the motion to expunge in which he acknowledged his role in the matter and his errors. The respondent appeared at a hearing before a judge of the bankruptcy court and fully disclosed his conduct. The husband, however, has been unable to get the bankruptcy filing deleted from all of the credit reporting agencies' records.

Sanction. Although he relied on the representations of the wife, who misled him as to her husband's intentions while concealing from her husband her efforts to seek bankruptcy protection, the respondent does not dispute that he engaged in the misrepresentations found by the board. Although he left telephone messages for the husband at the numbers provided by the wife, the respondent admits that he never spoke to or met with the husband before filing the bankruptcy petition on behalf of both the husband and the wife. The respondent admits further that he did represent himself to be the husband, both orally and in a signed certification to the bankruptcy court, and did certify to the bankruptcy court that he had consulted with the husband, advised the husband as to possible bankruptcy options, and made the statutorily mandated disclosures to the husband, well aware that these statements were false.

The respondent asserts however, as the board found, that his misrepresentations were made in a misguided effort to assist the wife (and her husband) in an emergency situation in order to avoid an imminent foreclosure on their home. The board noted, in mitigation, that the respondent was a relatively inexperienced attorney at the time of the filings at issue, he had been practicing law for only five years, and had filed approximately twelve bankruptcy petitions. The board, emphasized as well, that the respondent had been "duped" by the wife, was acting in an emergency situation, did not act from self-interest, promptly and fully admitted his conduct, and showed remorse.

Review of attorney disciplinary proceedings is de novo, but a reviewing court gives substantial deference to the board's recommendations. See Matter of Murray, 455 Mass. 872, 882 (2010). The board's recommendations are

not binding, and "[w]hen deciding what sanction is appropriate we look to the discipline imposed in comparable cases." In re Angwafo, 453 Mass. 28, 34, 37 (2009). The sanction imposed should not produce outcomes "markedly disparate" from the results in similar cases. See Matter of Murray, supra at 882-883. The offending attorney "must receive the disposition most appropriate in the circumstances." Matter of the Discipline of an Attorney, 392 Mass. 827, 837 (1984).

As the board stated, deliberate misrepresentation by an attorney to a tribunal generally warrants a one-year suspension, see Matter of McCarthy, 416 Mass. 423 (1993), and, in some circumstances, misrepresentation under oath warrants a two-year suspension. Compare Matter of Shaw, 427 Mass, 764, 764, 768-770 (1998) (two-year suspension where respondent made false statements under oath in federal criminal trial, filed false affidavit in civil proceeding, issued false opinion letter to which he affixed notarization, and forged another attorney's name); Matter of Balliro, 453 Mass. 75, 86-87 (2009) (six-month suspension where attorney falsely testified in criminal trial in which she was victim witness; substantial mitigation warranted deviation from presumptive two year suspension). Notwithstanding the respondent's intention to assist the couple, the respondent engaged in deliberate and repeated misrepresentation to the bankruptcy court, on behalf of an alleged client whom he had never met. See Matter of Neitlich, 413 Mass. 416, 420, 422 (1992) (one-year suspension where false statement was "active," "deliberate," and "planned").

In applying mitigating factors to the presumptive sanction, the board emphasized that the respondent was a "relatively new attorney" facing an "emergency situation." The

board noted that, while the respondent could have pursued other alternatives to respond to the wife's emergency, "[t]he ability to respond to an emergency with flexible and creative solutions is one of the marks of a seasoned professional." This conclusion is unavailing. At the time of the misconduct, the respondent had been practicing for five years and was not a newly-minted attorney. More significantly, impersonating a client one has never met is so obvious an error that lack of experience is not mitigating. See Matter of Bryan, 411 Mass, 288, 291 (1991).

The board relied heavily on disciplinary cases where a three- to six-month suspension was imposed, based on mitigating factors, because the misrepresentations were not "material" and did not concern "facts at the heart" of the client's case. The board noted that the respondent did not misrepresent the essential, dire facts of the couple's financial situation.[2] The misrepresentations in the cases cited, however, involved statements such as the attorney claiming to have a scheduling conflict in order to obtain a continuance. See, e.g., Matter of Long, 16 Mass. Att'y Disc. R. 250 (2000).

A false statement that one is the client, and that one has met with a client one has never seen, is not an "immaterial" element of a client's case.

> "All attorneys, whether those of long standing or those recently admitted to the Massachusetts bar, are expected to know and understand their professional obligation to be truthful in court. It is a simple and unambiguous standard of ethical conduct, and the respondent violated it. Notwithstanding the

[2] Nonetheless, as the board stated also, "Here, Congress has required a certificate of credit counseling as a necessary part of a bankruptcy petition. Under such circumstances, it must be considered material to the bankruptcy."

> substantial mitigating factors in this case, we cannot condone the actions of an attorney in giving false testimony under oath, irrespective of the circumstances."

See Matter of Balliro, supra at 88-89. The court concluded in that case that the appropriate disciplinary sanction was a six-month suspension from the practice of law. Id. See also In Matter of Finnerty, 418 Mass. 821 (1994) (six-month suspension for misrepresentation on attorney's personal financial statement in own divorce action). As the board observed, in this case there were several "decision points" at which the respondent had an opportunity to "cure or mitigate his earlier missteps" and failed to do so. Nonetheless, I agree with the board that, in the circumstances here, substantial mitigation from the presumptive one- or two-year suspension is warranted.

Conclusion. Having considered these facts and the discipline that has been imposed in comparable cases, I conclude that the appropriate sanction in this case is a six-month suspension.

By the Court,
Fernande R.V. Duffly
Associate Justice

Entered: August 31, 2011

493 Mass. 1010
Supreme Judicial Court of Massachusetts.

In the MATTER OF James HAYES.

SJC-13388
|
November 10, 2023

Synopsis

Background: Board of Bar Overseers filed information recommending that attorney be disbarred for violations of Rules of Professional Conduct. Following hearing, single justice of Supreme Judicial Court imposed sanction of disbarment, and attorney appealed.

Holdings: The Supreme Judicial Court held that:

substantial evidence supported findings that attorney violated Rules of Professional Conduct by advising client, who won lottery, about strategy to conceal funds from probate court in action by mother of client's child to increase child support;

evidence supported finding that attorney violated Rules by filing petition for bankruptcy on client's behalf for improper purpose of staying enforcement of probate court orders;

substantial evidence supported finding that attorney violated Rules by directing client to sign predatory and oppressive fee agreement and durable power of attorney, with explanation of documents, and withdrawing almost one-half of client's lottery winnings in trust account as purported legal fees, without providing client notice of withdrawals or generating appropriate billing statements, time records, or accountings; and

disbarment was appropriate sanction for attorney's violations of Rules.

Affirmed.

Procedural Posture(s): On Appeal.

****575** Attorney at Law, Disciplinary proceeding, Disbarment. Fraud.

Attorneys and Law Firms

***1017** The case was submitted on the record, accompanied by a memorandum of law.

Edward R. Wiest, Cambridge, for the respondent.

Opinion

RESCRIPT

The respondent attorney, James Hayes, appeals from an order of a single justice of this court disbarring him from the practice of law. We affirm.

1. Background. On June 30, 2020, bar counsel filed a four-count petition for discipline with the Board of Bar Overseers (board) against the respondent, alleging violations of the rules of professional conduct then in effect. [1] Count one alleged that the respondent advised and assisted a client in using improper, meritless, and fraudulent strategies to conceal lottery winnings from the Probate and Family Court (probate court) and the mother of the client's children, [2] including by filing a ****576** frivolous bankruptcy petition, [3] and making knowing misrepresentations ***1011** in court proceedings. [4] Count one also alleged that the respondent failed to adequately explain the matter so as to permit the client to make informed decisions about representation, failed to communicate in writing the scope of his representation and the basis of the fees to be charged, [5] and improperly required the client to waive enforcement of ethical rules in signing the fee agreement. [6]

Count two alleged that the respondent assisted his client in engaging in fraudulent conduct, unlawfully obstructed another party's access to evidence and information, and knowingly disobeyed court orders. [7]

Count three alleged that the respondent failed to maintain accounting records for three trust accounts, [8] failed to provide the client with itemized billing or notice of withdrawals, [9] made misrepresentations to the client's successor counsel that he had provided an accounting to the client and to bar counsel, [10] and failed to provide the client with his file upon request or promptly render a full accounting of trust funds upon final distribution. [11] Additionally, count three alleged that the respondent intentionally misused client funds with intent to deprive and resulting deprivation, [12] or, in the alternative, charged and collected clearly excessive fees; [13] and that the respondent knowingly charged the client for unnecessary and meritless work for the sole purpose of extracting money. [14]

****577** Finally, count four alleged that the respondent engaged in additional dishonest conduct by causing the client to withdraw his first bar complaint in exchange for a small refund and by drafting the withdrawal letter to bar counsel. [15]

After a five-day evidentiary hearing, at which the respondent was represented by counsel, the hearing committee issued a report finding that bar counsel had proved all of the charged violations and recommending that the respondent be disbarred. The board voted to adopt the hearing committee's factual findings and ***1012** legal conclusions, as well as its recommendation of disbarment. [16] Two members of the board wrote a separate concurring opinion to express disagreement with the majority's reasoning, but they agreed that disbarment was appropriate. [17]

The board thereafter filed an information in the county court pursuant to S.J.C. Rule 4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009), recommending that the respondent be disbarred. After a hearing, a single justice of this court concluded that the board's factual findings, with one minor exception, were "amply" supported by the record and agreed that the allegations of misconduct had been proved as charged. The single justice imposed the recommended sanction of disbarment, and the respondent appealed, pursuant to S.J.C. Rule 2:23 (b), 471 Mass. 1303 (2015). [18]

2. Discussion. On appeal, the respondent does not raise challenges to most of the detailed factual findings made by the hearing committee or to the violations of the rules of professional conduct stemming therefrom. See notes 2-15, supra. He instead focuses on one specific finding, which he believes undergirds the board's recommendation of disbarment, concerning whether he advised the client to engage in a fraudulent scheme. He also takes issue with the determinations of misconduct related to his filing of a bankruptcy petition, and a petition for interlocutory relief filed in the Appeals Court.

In assessing the sufficiency of the evidence, "[t]he subsidiary findings of the hearing committee, as adopted by the board, shall be upheld if supported by substantial evidence" (quotations and citations omitted). Matter of Diviacchi, 475 Mass. 1013, 1019, 62 N.E.3d 38 (2016). Within this context, "[t]he hearing committee ... is the sole judge of credibility, and arguments hinging on such determinations ****578** generally fall outside our proper scope of review." Id. at 1018-1019, 62 N.E.3d 38, quoting Matter

of McBride, 449 Mass. 154, 161-162, 865 N.E.2d 1110 (2007). After carefully reviewing the record, we agree with the single justice that the hearing committee's findings of misconduct are supported by substantial evidence.

The misconduct at issue arises from the respondent's representation of a client who won the Massachusetts lottery in August 2013. Shortly after the client received his winnings in a lump-sum payment, the client's ex-girlfriend filed a complaint in the probate court, seeking an increase in child support. The probate court subsequently entered temporary orders prohibiting the client from spending or transferring his winnings (and later, certain automobiles), and appointed ***1013** a receiver to hold the funds. After the first such order issued, the client began consulting with the respondent about the probate court matter and his lottery winnings. The hearing committee found, and the board accepted, that the respondent advised him on an (improper) strategy to conceal these assets from the probate court and the client's ex-girlfriend by falsely claiming that a prior verbal agreement existed between the client and his brother to split the lottery winnings on a fifty-fifty basis.

The respondent contests this finding, intimating that such an agreement between the brothers did exist, or that, at the very least, the respondent believed as much.[19] In so doing, he challenges testimony from the client that was explicitly credited by the hearing committee. That credibility determination, however, was not inconsistent with other findings or the over-all chronology of events. See Matter of Murray, 455 Mass. 872, 880, 920 N.E.2d 862 (2010) ("The hearing committee's credibility determinations will not be rejected unless it can be said with certainty that [a] finding was wholly inconsistent with another implicit finding" [quotations and citation omitted]). The client first consulted with the respondent on or about September 3, 2013, before any assertions were made that a portion of the lottery winnings belonged to the client's brother. While the respondent argues that other portions of the client's testimony were not adopted by the hearing committee, the hearing committee was not required to take an all-or-nothing approach in assessing witness credibility. See Matter of Saab, 406 Mass. 315, 328, 547 N.E.2d 919 (1989). Accordingly, there was no error in the single justice's determination that the respondent advised the client to engage in a fraudulent scheme.

In furtherance of the goal of improperly concealing the client's lottery winnings, the respondent advised and assisted the client in pursuing a series of activities that the respondent knew to be fraudulent or in violation of court orders. These activities included setting up trust accounts for the sole purpose of secreting the lottery funds in the respondent's interest on lawyers' trust account (and periodically disbursing portions those funds to himself) in violation of orders of the probate court, making intentional misrepresentations about the client's assets in court proceedings, and obstructing and filing a frivolous bankruptcy petition of behalf of the client for the sole purpose of staying enforcement ****579** of the probate court orders. See Mass. R. Prof. C. 1.2 (d), as appearing in 471 Mass. 1313 (2015) (assisting or counselling client to engage in conduct known to be fraudulent); Mass. R. Prof. C. 3.4 (a), as appearing in 471 Mass. 1425 (2015) (unlawfully obstructing another party's access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value); rule 3.4 (c) (knowingly disobeying obligation under rules of tribunal); Mass. R. Prof. C. 8.4 (a), as appearing in 471 Mass. 1483 (2015) (violation of rules of professional conduct); rule 8.4 (c) (dishonesty, fraud, deceit, or misrepresentation); rule 8.4 (d) (conduct prejudicial to administration of justice); and rule 8.4 (h) (fitness to practice law).

***1014** Of the many activities that the hearing committee found to be in furtherance of this scheme, the respondent takes issue with only two. Specifically, he disputes that his filing of the bankruptcy petition was improper, asserting that the filing of such petitions is recognized as "an ordinary and appropriate means of protecting property,"[20] and similarly defends his subsequent filing of a petition for interlocutory relief in the Appeals Court relating to the probate court orders. As an initial matter, "from a disciplinary perspective, [these arguments] are ... largely beside the point because of the other very serious misconduct charged and found by the board." Matter of Moran, 479 Mass. 1016, 1018, 95 N.E.3d 226 (2018). Regardless, they fail on the merits as well because, as the hearing committee found, the respondent did not have a nonfrivolous basis in law and fact for the bankruptcy petition. See Mass. R. Prof. C. 3.1, as appearing in 471 Mass. 1414 (2015). The bankruptcy petition was "skeletal" by the respondent's own description, and it contained numerous falsehoods about the client's financial assets. As the hearing committee found, it was filed for the sole, improper purpose of evading the client's child support obligations and preventing the client's ex-girlfriend and a court-appointed receiver from discovering and obtaining the client's assets, in contravention of

court orders. The single justice thus did not err in concluding that the bankruptcy petition was frivolous and filed in bad faith, as part of an improper strategy to conceal the lottery winnings. See Matter of Laroche-St. Fleur, 490 Mass. 1020, 1020 & n.4, 1022-1023, 196 N.E.3d 752 (2022) (untimely motion and subsequent appeals, which did not raise any issue that was not or could not have been raised previously, were frivolous and intended merely to delay). Indeed, according to the respondent's own testimony, even he did not believe he had an adequate legal basis for the bankruptcy petition when he filed it on October 9, 2013, and later sought interlocutory relief in the Appeals Court for that reason; that interlocutory petition was thus similarly improper because, as the single justice correctly noted, it was "[i]n furtherance of this scheme" to conceal the lottery winnings.

In the course of representing the client, the respondent also directed the client to sign an "oppressive and predatory" fee agreement, without explaining its terms, and a durable power of attorney that gave the respondent "sole discretion" to decide what work to perform and what ****580** fees to charge, without notice to the client or authorization. See Mass. R. Prof. C. 1.15 (d) (2), as appearing in 471 Mass. 1380 (2015) (trust account documentation). Pursuant to this fee agreement, the respondent withdrew over $78,000 of the client's lottery winnings as purported legal fees, without providing the client notice of the withdrawals or generating appropriate billing statements, time records, or contemporaneous accountings of any kind. See rule 1.15 (f) (1) (trust account documentation). The billing records that were introduced in evidence at the hearing were ones that the respondent prepared in response to bar counsel's investigation. See Matter of Zankowski, 487 Mass. 140, 147, 149, 164 N.E.3d 898 (2021) (fraudulent billing supported by substantial evidence where, inter alia, attorney testified as to purported basis for adding hours to client bills, but failed to produce any contemporaneous records ***1015** or notes to support her version of events); Matter of Strauss, 479 Mass. 294, 298, 94 N.E.3d 770 (2018) (declining to credit testimony where respondent "provided bar counsel with 'reconstructed records' to conceal his misuse of the client's money").

Even taken at face value, and as the hearing committee found, those records reflect clearly excessive fees, charges for fees to which the respondent was not entitled, as well as double billing for the same legal work. Apart from one specific instance of double billing, the respondent does not raise challenges to these findings on appeal and instead contends that imposing the sanction of disbarment is disproportionate for such misconduct. Like the respondent's other claims, this claim lacks merit as discussed infra.

In sum, we agree with the single justice that the board's findings of misconduct are supported by substantial evidence.

3. Appropriate sanction. On appeal, "[w]e review de novo the disciplinary sanction imposed by the single justice to determine whether it is markedly disparate from judgments in comparable cases" (quotations and citation omitted). Matter of Williams, 491 Mass. 1021, 1026, 202 N.E.3d 1219 (2023). In considering the appropriate sanction, "the board's recommendation is entitled to substantial deference." Matter of Tobin, 417 Mass. 81, 88, 628 N.E.2d 1268 (1994). "Our primary concern in bar discipline cases is the effect upon, and perception of, the public and the bar, ... and we must therefore consider, in reviewing the board's recommended sanction, what measure of discipline is necessary to protect the public and deter other attorneys from the same behavior" (citation omitted). Matter of Laroche-St. Fleur, 490 Mass. at 1023–1024, 196 N.E.3d 752.

The respondent contends that the sanction of disbarment is disproportionate because the findings of fraud were not supported by substantial evidence, an argument that lacks merit for the reasons discussed supra. The respondent also argues that it was improper to conclude that his misconduct amounted to intentional misuse of client funds with deprivation resulting, so as to warrant indefinite suspension or disbarment, without precisely quantifying the amount of unearned fees collected.

As an initial matter, it is worth noting that we do not view this as an excessive fee case. Rather, "[t]he entire engagement [between the respondent and the client] was imbued with fraud and greed." The respondent "prey[ed] on his client's lack of education, mental health issues, and the stress induced by the [p]robate [c]ourt proceedings" to draft and have the client sign a "predatory" fee agreement and durable power of attorney. That fee agreement ****581** gave the respondent sole discretion over what matters to pursue, how much to charge for each matter, and even how to define a "matter" for billing purposes -- all without need to inform the client. All told, of $203,500 in client funds that the respondent held in trust, the respondent paid close to one-half of that amount to himself. For nearly all of these withdrawals, the client had no notice and thus no ability to

understand or dispute the purported basis for the withdrawal. Indeed, even the explanations that the respondent supplied to the hearing committee for the basis of his withdrawals reflect charges for fees to which the respondent was not entitled.

The "[k]nowing submission of false or fraudulent bills ... is not equivalent to charging an excessive fee." Matter of Zankowski, 487 Mass. at 151, 164 N.E.3d 898 (dishonest nature of respondent's intentional overbilling differentiated her misconduct from cases involving charges of excessive fees). See Matter of Goldstone, 445 Mass. 551, 566, 839 N.E.2d 825 (2005) ("Where an attorney lacks a good faith belief that he has ***1016** earned and is entitled to the monies, such conduct constitutes conversion and misappropriation of client funds"). As noted in Matter of Zankowski, supra, other cases involving intentional overbilling have resulted in terms of suspension. See id. (listing cases of such misconduct that have resulted in one- to four-year suspensions). In Matter of Goldstone, supra, however, an attorney who intentionally overbilled a corporate client was disbarred because of the particularly egregious nature of his misconduct -- he not only overbilled in the amount of hundreds of thousands of dollars, but his misconduct was aggravated by threats to retain additional client funds unless he was paid and by his payment of only partial restitution, made after the initiation of disciplinary proceedings.

Here, the respondent's misconduct relating to client funds was accompanied by independently egregious misconduct -- namely, a fraudulent scheme, across multiple courts, to improperly hide the client's assets, in violation of court orders. As the board observed, this involved "advancing a blatant falsehood" that the client's brother was entitled to one-half of the lottery winnings, and "extended to filing fraudulent documents in the [p]robate [c]ourt and [b]ankruptcy [c]ourt such as [a] sham list of expenses," "intentionally misl[eading] the courts, the receiver, and [the client's ex-girlfriend]," and preventing the latter from "obtaining the true facts concerning the amount of funds available for child support." Individual acts of misconduct contained within this scheme would, standing alone, warrant a term of suspension. See, e.g., Matter of Moran, 479 Mass. at 1021, 95 N.E.3d 226 ("An intentional misrepresentation to a court typically warrants a suspension of at least one year"). When considered in its entirety, however, the cumulative effect of the respondent's fraudulent scheme warrants a more severe sanction. See Matter of Crossen, 450 Mass. 533, 581, 880 N.E.2d 352 (2008) (disbarring attorney who orchestrated elaborate and dishonest scheme to extract damaging information from former judicial law clerk in effort to discredit judge presiding over client's case); Matter of Zadworny, 26 Mass. Att'y Discipline Rep. 722 (2010) (accepting joint recommendation of indefinite suspension where attorney filed false statements in probate court, charged excessive fee, and intentionally misused funds held in trust). See generally Matter of Saab, 406 Mass. at 326-327, 547 N.E.2d 919 (consideration of cumulative effect of multiple violations is proper).

As the board observed, there are also multiple factors to be weighed in aggravation of the respondent's misconduct, ****582** and none to be weighed in mitigation. The respondent not only orchestrated a fraudulent scheme in which he intentionally misled the courts, the receiver, and the mother of his client's children, but took advantage of an unsophisticated and vulnerable client with a limited education and mental health issues. See Matter of Zak, 476 Mass. 1034, 1041, 73 N.E.3d 262 (2017) (taking advantage of vulnerable clients serves as aggravating factor). This misconduct was further aggravated by the respondent's complete inability to recognize the wrongfulness of his conduct, see Matter of Bailey, 439 Mass. 134, 152, 786 N.E.2d 337 (2003), and cases cited, and his lack of candor before the hearing committee, see Matter of Eisenhauer, 426 Mass. 448, 455-456, 689 N.E.2d 783 (1998).[21] In these circumstances, disbarment is appropriate. See Matter of Zak, supra; Matter of Crossen, 450 Mass. at 581, 880 N.E.2d 352.

Judgment affirmed.

All Citations

493 Mass. 1010, 220 N.E.3d 573

Footnotes

1 In instances where the current versions of the rules of professional conduct contain substantially the same language as those in effect during the events at issue, we cite to the current versions for the sake of simplicity. See Matter of Ablitt, 486 Mass. 1011, 1013 n.5, 161 N.E.3d 421 (2021).

2 This was alleged to involve violations of Mass. R. Prof. C. 1.2 (a), as appearing in 471 Mass. 1313 (2015) (failing to accomplish lawful objectives by reasonably available means); rule 1.2 (d) (assisting or counselling client to engage in conduct known to be fraudulent); Mass. R. Prof. C. 3.4 (a), as appearing in 471 Mass. 1425 (2015) (unlawfully obstructing another party's access to evidence or unlawfully altering, destroying, or concealing document having potential evidentiary value); rule 3.4 (c) (knowingly disobeying obligation under rules of tribunal); Mass. R. Prof. C. 8.4 (a), as appearing in 471 Mass. 1483 (2015) (violation of rules of professional conduct); rule 8.4 (c) (dishonesty, fraud, deceit, or misrepresentation); rule 8.4 (d) (conduct prejudicial to administration of justice); and rule 8.4 (h) (fitness to practice law).

3 This was alleged to be a violation of Mass. R. Prof. C. 3.1, as appearing in 471 Mass. 1414 (2015) (meritorious claims and contentions), and rule 8.4 (a), (c), (d), and (h).

4 This was alleged to be a violation of Mass. R. Prof. C. 3.3 (a) (1) and (2), as appearing in 471 Mass. 1416 (2015) (candor toward tribunal); and rule 8.4 (c) and (d).

5 This was alleged to be a violation of Mass. R. Prof. C. 1.4 (b), as appearing in 471 Mass. 1319 (2015) (communication with clients) and Mass. R. Prof. C. 1.5 (b) (1), as appearing in 463 Mass. 1302 (2012) (communication about fees).

6 This was alleged to be a violation of rule 1.2(a), rule 1.4(b), and rule 8.4(c), (d), and (h).

7 Count two alleges violations of rule 1.2 (d); rule 3.4 (a) and (c); and rule 8.4(a), (c), (d), and (h).

8 This was alleged to be a violation of Mass. R. Prof. C. 1.15 (f) (1), as appearing in 471 Mass. 1380 (2015) (trust account documentation).

9 This was alleged to be a violation of rule 1.15 (d) (2) (accounting).

10 This was alleged to be a violation of rule 8.4 (c).

11 This was alleged to be a violation of rule 1.15 (d) (1) (accounting) and Mass. R. Prof. C. 1.16 (e), as appearing in 471 Mass. 1395 (2015) (terminating representation).

12 This was alleged to be a violation of rule 1.15 (b) (segregation of trust funds) and rule 8.4 (c).

13 This was alleged to be a violation of Mass. R. Prof. C. 1.5 (a), as amended, 480 Mass. 1315 (2018) (clearly excessive fees).

14 This was alleged to be a violation of rule 1.5 (a) and rule 8.4 (c).

15 Count four alleged violations of S.J.C. Rule 4:01, § 10, as appearing in 425 Mass. 1313 (1997), and rule 8.4(c) and (h).

16 One member of the board recused herself.

17 Specifically, the concurrence took issue with the majority's conclusion that the respondent's charging of clearly excessive fees constituted intentional misuse of client funds with deprivation.

18 The respondent has filed a motion to supplement the record with (1) reformatted copies of the transcripts of the evidentiary hearing; and (2) additional materials outside the record below. We grant the motion insofar as it concerns the hearing transcripts, but otherwise deny the motion. The additional materials consist principally of documents that the respondent failed to offer as evidence at the hearing, as well as documents that were deemed irrelevant by the hearing committee. See Matter of Diviacchi, 491 Mass. 1003, 1007 n.8, 198 N.E.3d 458 (2022); Matter of Dragon, 440 Mass. 1023, 1024, 798 N.E.2d 1011 (2003). A portion of these materials was already the subject of a pro se filing seeking to expand the record before the single justice. Like the single justice, we decline to consider them. See Matter of Gannett, 489 Mass. 1007, 1010, 182 N.E.3d 956 (2022). Moreover, we note that many of the omitted materials are "cumulative of argument and evidence" that was considered by the hearing committee, and do not "detract[ ] from the conclusion that a sanction less than disbarment is not warranted." See Matter of Dragon, supra.

19 It is worth noting the internal inconsistency of this particular argument. As described infra, the respondent disbursed a substantial portion of the lottery winnings to himself as purported legal fees for services performed on behalf of the client. If, as the respondent suggests, he genuinely believed these funds corresponded to a "share" owned by the client's brother, he intentionally misused the brother's funds to pay himself for services rendered to the client.

20 Notably, this assertion is contrary to the respondent's own testimony at the hearing. In reference to his negotiations with the receiver over the joint stipulation filed in the bankruptcy court, the respondent testified that he would not agree to the inclusion of language indicating that the client had filed the bankruptcy petition for the purpose of evading child support obligations. He characterized this language as a "poison pill" because it would require the client to "basically ... admit [to] bankruptcy irregularities."

21 The hearing committee found that the respondent gave testimony that was intentionally false, including, inter alia, claiming he had minimal involvement in drafting the fee agreement, claiming he withdrew trust account funds at one point because someone was trying to levy on his interest on lawyers' trust account, claiming his records were lost in a computer backup failure, and claiming the bankruptcy petition was not frivolous or intended solely to delay the probate court proceedings.

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Faculty

Hon. Peter G. Cary is Chief Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Maine in Portland, initially appointed in 2014. He is also a panel member of the U.S. Bankruptcy Appellate Panel for the First Circuit, a member of the First Circuit Workplace Conduct Committee, and member of the First Circuit Access to Justice Committee - Bankruptcy Court Subcommittee, an Observer Judge for the First Circuit Judicial Council, the chair of the Academic Recognition Committee of the National Conference of Bankruptcy Judges, the treasurer of the Maine State-Federal Judicial Council, and an advisory director of the Nathan & Henry B. Cleaves Law Library. Judge Cary is Board Certified in both Consumer Bankruptcy Law and Business Bankruptcy Law by the American Board of Certification. He received his undergraduate degree *cum laude* and Phi Beta Kappa from the University of Massachusetts at Amherst in 1982 and his J.D. *cum laude* from Boston College Law School in 1987.

Keri W. Costello is counsel in Sullivan & Worcester LLP's Bankruptcy & Restructuring practice group in New York. She represents stakeholders in a broad range of bankruptcy matters and related litigation, as well as out-of-court restructurings and problem loan workouts. Ms. Costello has handled chapter 11 representations across a diverse range of industries, including retail, oil and gas services, biopharmaceuticals and health care. Her clients include master and bond trustees, secured and unsecured creditors, and equityholders. Ms. Costello is an active member of ABI and the International Women's Insolvency & Restructuring Confederation. She is admitted to practice in Massachusetts, Maine and New York, before the U.S. District Courts for the Districts of Maine, Massachusetts, and the Northern and Southern Districts of New York, the First Circuit Court of Appeals and the U.S. Supreme Court. Ms. Costello received her B.A. from St. Michael's College and her J.D. *cum laude* from Western New England College School of Law.

Pamela A. Harbeson is the assistant bar council at the Office of the Bar Council in Boston, where she investigates and prosecutes violations of the ethical rules of professional conduct. She previously wa sa partner with Looney & Grossman and taught bankruptcy and creditors' rights as an adjunct professor at New England School of Law. Ms. Harbeson received her B.A. in 1984 in philosophy from Drew University and her J.D. in 1992 from Boston College Law School.

Andrew C. Helman is a partner in the Restructuring, Insolvency and Bankruptcy practice group at Dentons Bingham Greenebaum in Portland, Maine, where he focuses his practice on bankruptcy and insolvency matters and works to restructure all types of businesses, including those in the health care sector. He has served as lead counsel to debtors, trustees, secured parties and others in chapter 11 cases, including having served as independent counsel to a state attorney general in several chapter 11 cases in New England and Delaware. Mr. Helman has particular experience as lead counsel representing rural hospitals in chapter 11 cases, and has successfully confirmed chapter 11 plans that have allowed rural hospitals to continue operating with restructured balance sheets. His practice also includes commercial and insolvency-related litigation. He successfully obtained three temporary restraining orders and a permanent injunction against the U.S. Small Business Administration due to the agency's decision to exclude debtors from participating in the federal Paycheck Protection

Program. Mr. Helman frequently writes articles for national insolvency publications and teaches seminars on bankruptcy and fraudulent transfer law. In addition, he formerly co-chaired ABI's Health Care Committee and was honored in ABI's 2019 class of "40 Under 40." Mr. Helman was selected as one of 40 attorneys nationally to participate in the National Conference of Bankruptcy Judges' 2016 NextGen Program. He is ranked in *Chambers* for bankruptcy and restructuring and has been listed in the 2015-20 issues of *Super Lawyers* as a "Rising Star." Mr. Helman received his B.A. *cum laude* from the University of Massachusetts and his J.D. *summa cum laude* from the University of Maine.