

## New Hampshire Supreme Court

### Professional Conduct Committee

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*Hurley, William J. advs. Attorney Discipline Office # 04-057*

### PUBLIC CENSURE

This matter was initiated by the Attorney Discipline Office. Prior to a hearing, Mr. Hurley and Disciplinary Counsel executed a stipulation as to facts, rules violated, and payment of costs. The Professional Conduct Committee ("Committee") considered the matter at its meeting on April 17, 2007, after granting the Assented-To Motion to Permit Waiver of Hearings Committee Process. Margaret Nelson, Committee Chair, presided. Other Committee members present were Benette Pizzimenti, Ellen L. Arnold, David N. Cole, Thomas P. Connair, Gerald A. Daley, Gretchen Rule Hamel, Reporter, James R. Martin, and David N. Page. Committee members Toni M. Gray, Alan J. Cronheim, and Richard H. Darling were not present and did not vote. Having considered the matter, the Committee reached the decision detailed below.

#### **I. FINDINGS OF FACT**

The Committee found, by clear and convincing evidence, the facts as agreed to in the Stipulation, as follows:

1. Mr. Hurley is an attorney licensed to practice law in New Hampshire. Mr. Hurley was admitted to practice in 1972. At all times material to this proceeding, Mr. Hurley operated his law office as Hurley Law Office, P.O. Box 4088, Portsmouth, New Hampshire 03802-4088.
2. On or about January 21, 2002, Russell Dupre was the victim of a motor vehicle accident.
3. On March 7, 2002, by order of the Rockingham County Probate Court, Mr. Hurley was appointed to represent Mr. Dupre as a proposed ward in a guardianship proceeding.

4. On March 20, 2002, the Probate Court appointed Tri-County CAP, Inc. to serve as Guardian (hereinafter the "Guardian") over the person and estate of Mr. Dupre.
5. On or about the same date, the Court requested that Mr. Hurley represent Mr. Dupre's interests with respect to the accident.
6. As a result of Mr. Hurley's efforts on behalf of Mr. Dupre, on June 17, 2003, the defendant's insurance company paid the policy limits of \$50,000.00.
7. On June 24, 2003, Mr. Hurley deposited the settlement proceeds into two separate accounts at Ocean National Bank, each with an amount equal to \$25,000.00. One account was a money market savings account (account #13-30-0335-5), and the other was a checking account (account #13-30-0334-7). Both accounts were listed as follows:  
"Russell Dupre Principal, William J. Hurley, Agent."
8. Also on June 24, 2003, Mr. Hurley wrote a check to himself for \$16,650.00 from the checking account, a disbursement to cover his one-third contingent fee.
9. Beginning in July 2003, the Guardian began inquiring of Mr. Hurley as to the status of the remaining funds.
10. On July 23, 2003, the Guardian sent to Mr. Hurley via telefax the records of Mr. Dupre's outstanding medical bills, which totaled \$12,338.45.
11. On September 11, 2003, the Guardian telefaxed a written inquiry to Mr. Hurley as to the status of the remaining funds.
12. Having heard nothing from Mr. Hurley in response to the Guardian's inquiries, the Guardian retained Scott D. McGuffin, Esq., to pursue Mr. Hurley for the funds.
13. On December 16, 2003, Mr. McGuffin wrote the following letter to Mr. Hurley:

Mr. Dupre's guardian has instructed me to pursue retrieval of the remainder of the funds from Mr. Dupre's personal injury settlement which remains in your possession by filing a petition with the Probate Court.

Prior to employing this avenue I am, as a matter of professional courtesy, writing to you in order to seek your long-awaited cooperation with regard to the resolution of this matter.

My understanding is that you have been paid your contingency fee and that there remain unpaid medical and related bills in the amount of \$12,338.46 (as of the 07/23/03 faxed memo to you). In

order to resolve this matter immediately and to eliminate further legal action, might I suggest you deliver a check to my office on behalf of the guardian for the balance of the proceeds? The guardian will see that the above referenced medical bills are paid.

I trust we can conclude this matter informally prior to Christmas.

14. At that point, Mr. Hurley was holding approximately \$33,350.00 of Mr. Dupre's funds.

15. Having heard nothing from Mr. Hurley, on or about January 14, 2004, Mr. McGuffin filed in Rockingham County Probate Court a "Motion for Clarification and Further Orders." The prayer for relief stated:

1. That the Court issue further orders requiring Attorney Hurley to provide an accounting for the settlement funds;
2. That orders be issued requiring Attorney Hurley to deliver the balance of net proceeds held by him in his trust account for the benefit of the ward to the Guardian;
3. That in the event that this delivery of funds does not occur by a date specific established by the Honorable Court that a Show Cause Hearing be held in this matter for the Honorable Court; and,
4. For such other and further relief as may be just and equitable under the circumstances in this matter.

16. On February 5, 2004, the Probate Court (O'Neill, C., J.) issued the following Order:

There being no objection the Court orders an accounting be filed by Atty Hurley within 10 days and the funds be delivered to the guardian w/in 10 days.

17. Having not received any further communication from Mr. Hurley, on or about February 19, 2004, Mr. McGuffin filed a "Motion for Contempt," seeking the following in his prayer for relief:

1. That the Court find that William Hurley, Esquire is in Contempt of the Court's Order dated February 5, 2004 due to his failure to remit the net proceeds from the personal injury recovery to the Guardian and his failure to file an accounting thereon;

2. That the Court schedule a hearing requiring delivery of the funds and the above-referenced accounting and further to determine the reason for noncompliance with the Court's Order;
  3. That the Court determine whether Attorney Hurley's conduct rises to the level of a reportable violation under the Code of Professional Responsibility;
  4. That Attorney Hurley be required to reimburse the Guardian the costs of the Motion for Clarification and Further Orders, this Motion, attendance of the Guardian and Counsel at the above-referenced show-cause hearing and for such other expenses which may be incurred relative to enforcement of this Order;
  5. For such other and further relief as may be reasonable and just.
18. On or about February 21, 2004, Mr. Hurley disbursed to the Guardian the funds remaining in the two accounts, minus debits for bank fees (\$20.46) and a probate filing fee (\$75.00). The disbursement totaled \$33,323.06.
  19. On March 17, 2004, the Probate Court held a hearing on the Motion for Contempt. At that hearing, Mr. Hurley appeared and explained to the Court that, after June 24, 2003, he had not opened any of the bank statements or other mail pertaining to the Guardian's case.
  20. As a result of that hearing, the Probate Court issued an Order dated March 17, 2004, requiring Mr. Hurley to reimburse Mr. McGuffin "within 30 days" in an amount equal to Mr. McGuffin's legal fees for pursuing the Guardian's funds (\$1,572.50) and certain other related expenses incurred by the Guardian (\$82.75).
  21. Because Mr. Hurley did not reimburse the Guardian or Mr. McGuffin within the 30-day deadline, Mr. McGuffin filed a "Second Motion for Contempt."
  22. On April 27, 2004, Mr. Hurley reimbursed both the Guardian and Mr. McGuffin in full in accordance with the Court's March 17, 2004, Order. As a result, Mr. McGuffin withdrew his Second Motion for Contempt.

## II. DISCIPLINARY RULES VIOLATED

The above facts having been established, the Committee found, by clear and convincing evidence, the violations of disciplinary rules as agreed to in the Stipulation, as follows:

23. In all instances described below, the Guardian acted in the interests of Mr. Dupre, the client in this matter.

### **Rule 1.4(a)-(c): Failure to Communicate**

24. Allegations set forth above are incorporated by reference.
25. Between June 24, 2003, and February 21, 2004, Mr. Hurley retained control over funds to which the Guardian was entitled. After June 24, 2003, the Guardian made attempts to communicate with Mr. Hurley about the status and disbursement of those funds. Mr. Hurley failed to respond or otherwise communicate with the Guardian.
26. As a result of Mr. Hurley's failure to communicate, the Guardian had to hire separate counsel, Mr. McGuffin, to force Mr. Hurley to communicate with respect to the question of settlement proceeds and the proper distribution of those proceeds to the Guardian.
27. When Mr. Hurley failed also to communicate with Mr. McGuffin, Mr. McGuffin filed motions in Rockingham County Probate Court to force Mr. Hurley both to communicate with the Guardian and to disburse the funds.
28. After Mr. McGuffin filed a Motion to hold Mr. Hurley in contempt for his failure to distribute the net proceeds to the Guardian, Mr. Hurley communicated with Mr. McGuffin and fulfilled his obligation to distribute the funds to the Guardian of his client.
29. Mr. Hurley's conduct in this regard constitutes a failure both to keep the Guardian of his client reasonably informed regarding the status of the matter and to promptly comply with the Guardian's reasonable requests for information.
30. Mr. Hurley's conduct constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.4(a), 1.4(b), and 1.4(c).

### **Rule 1.15(b): Failure to Deliver Funds Promptly**

31. Allegations set forth above are incorporated by reference.
32. As of June 24, 2003, Mr. Hurley was holding funds belonging to the Guardian of his client.

33. Mr. Hurley retained the Guardian's funds from June 24, 2003, through February 21, 2004, without any justification and despite the Guardian's reasonable and timely requests for Mr. Hurley to pay the necessary medical bills and then disburse the remainder to the Guardian.
34. Because of Mr. Hurley's failure to promptly deliver the funds, the Guardian had to hire separate counsel to force Mr. Hurley to comply with his obligation to distribute the funds.
35. Mr. Hurley's conduct in this respect constitutes a failure to promptly deliver to the Guardian of his client funds that the Guardian's client is entitled to receive.
36. Mr. Hurley's conduct in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.15(b).

**Rule 3.4(c): Disobey Supreme Court Rule 50(2)(D)**

37. On the same date that Mr. Hurley deposited the proceeds of the settlement into the two bank accounts on behalf of Mr. Dupre, Mr. Hurley disbursed to himself full payment of his legal fee.
38. Supreme Court Rule 50(2)(D) states:

All funds received as proceeds of collections or awards on behalf of a client shall be deposited in gross in the trust account(s) required above, and shall not be charged with a fee until distribution.
39. Pursuant to this Rule, Mr. Hurley was required to distribute Mr. Dupre's portion of the proceeds before disbursing legal fees to himself.
40. Mr. Hurley disbursed to himself his full legal fees from the proceeds on June 24, 2003. Mr. Hurley made no distribution from the proceeds to the Guardian of his client until February 21, 2004.
41. In so doing, Mr. Hurley knowingly violated N.H. Sup. Ct. R. 50(2)(D).
42. Mr. Hurley's conduct in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.4(c).

### **Rule 8.4(a): Misconduct**

43. Because there exists clear and convincing evidence that Mr. Hurley violated the above rules, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

### **III. Sanction**

The purpose of the Court's disciplinary power "is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." E.g., Coffey's Case, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). Attorney discipline "is not intended as a mode of inflicting punishment for an offense." Id. at 512-13.

Although the Court has not adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) ("Standards"), it looks to them for guidance. Coffey's Case, 152 N.H. at 513. The Standards set forth a four-part analysis for courts to consider in imposing sanctions: "(a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Standards § 3.0; Coffey's Case, 152 N.H. at 513.

The first three factors create the framework for characterizing the misconduct and determining a baseline sanction. See Wolterbeek's Case, 152 N.H. 710, 714 (2005) ("In applying these factors, the first step is to categorize the respondent's misconduct and identify the appropriate sanction"). Once the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. See id. ("After determining the sanction, [the Court] considers the effect of any aggravating or mitigating factors on the ultimate sanction.").

As to the first factor, Mr. Hurley violated duties to his client as well as to his profession. In short, Mr. Hurley settled a matter for his client and deposited the proceeds from that settlement into an account in his client's name which was, as a practical matter, a quasi-trust account. Although Mr. Hurley paid himself from the proceeds the same day he opened the bank account, he did not deliver the balance to his client even after being ordered by the Court to do so. His failure to give proper attention to his client and to the Court violates the rules governing

communication (1.4), handling of client funds (1.15), and obeying the rules of a tribunal (3.4).

The second factor relates to Mr. Hurley's state of mind. The evidence is clear that with respect to each of Mr. Hurley's violations, he acted with gross negligence by ignoring his obligations both to his client and to the Court.

The third factor requires consideration of the potential or actual injury caused by Mr. Hurley's misconduct. Here, Mr. Hurley's conduct may have caused no actual injury to the client, as all the client's bills were ultimately paid out of the funds that Mr. Hurley eventually returned, and there was little risk of comingling or asset attachment because the funds were in a separate bank account. However, while the client's legal bills with respect thereto eventually were paid in full by Mr. Hurley, his failure to promptly return his client's money caused many months' delay in paying the bills and required his client's guardian to obtain legal counsel and initiate formal legal proceedings in order to recover that which should have been promptly paid. In cases such as this, the delay and the need to expend additional resources are, in and of themselves, injuries.

Further, Mr. Hurley also violated Rule 3.4(c). The injury caused by this misconduct was of a different nature than that caused by his violation of Rule 1.15. Specifically, in violating Rule 3.4(c), Mr. Hurley caused "serious interference with a legal proceeding," in that his client had to invoke contempt powers of the Court simply to obtain Mr. Hurley's attention. See Standards §6.2. Additionally, Mr. Hurley's misconduct caused injury to the legal profession, as anytime an attorney commits misconduct of this nature, s/he causes harm to the reputation of lawyers generally.

Having addressed the first three factors by considering the duties Mr. Hurley violated, his mental state, and the injuries caused by his misconduct, the Committee determined that the appropriate baseline sanction for Mr. Hurley's misconduct is a Public Censure.

The final factor is to determine whether any aggravating or mitigating factors are present that affect the baseline sanction. Disciplinary Counsel identified five mitigating factors in this case: no disciplinary history, no dishonest or selfish motive, a "timely and good faith effort to make restitution and to rectify the consequences of his misconduct", cooperation with the Attorney Discipline Office throughout the course of this matter, and genuine remorse. The Committee agrees that Mr. Hurley has no prior disciplinary history over the 30+ years he has been in practice and that he acted without a dishonest or selfish motive. However, the

Committee has no basis for finding that Mr. Hurley has expressed remorse for his misconduct, and believes that it is every attorney's duty to cooperate with the Attorney Discipline Office. Finally, the Committee specifically does not agree that the very basis for the original complaint, namely failure to return client funds and interfering with a legal proceeding, could possibly constitute a "timely and good faith effort" to make restitution.

Disciplinary Counsel identified three aggravating factors in this case: more than one act of misconduct, a vulnerable client, and substantial experience in the practice of law.

Considering the four factors together with the purposes of attorney discipline in New Hampshire, the Committee determined that the appropriate sanction in this matter is a Public Censure.

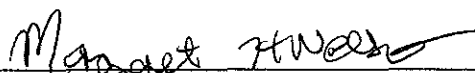
#### **IV. COSTS**

Mr. Hurley shall pay the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter.

#### **V. CONCLUSION**

Based on the above, the Professional Conduct Committee issues this Public Censure to William J. Hurley for the violations of the Rules of Professional Conduct cited herein.

June 19, 2007

  
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Margaret H. Nelson  
Chair

#### **Distribution:**

Landya McCafferty, Disciplinary Counsel  
William J. Hurley, Esquire  
File