CHARLES F. CLEARY

ADVS.

ROBERT LAMONTAGNE

#01-073

REPRIMAND

On June 15, 2004 and September 21, 2004, the Professional Conduct Committee heard oral arguments in the above-referenced matter. Landya B. McCafferty, Esq., Disciplinary Counsel appeared for the Attorney Discipline Office. John Kissinger, Esq., Respondent's Counsel, appeared on behalf of the Respondent Charles F. Cleary. Mr. Cleary and Robert LaMontagne were also present. The Professional Conduct Committee Panel consisted of Benette Pizzimenti, Esq., Chair, Thomas P. Connair, Esq., Reporter, Toni M. Gray, Morgan A. Hollis, Esq., David N. Page and Stephen B. Stepanek.

The Professional Conduct Committee thoroughly reviewed the record in this matter and makes factual findings and rulings as detailed below.

I. FACTUAL FINDINGS

The Professional Conduct Committee has determined that the record supports the following factual findings of the Hearing Panel, as stipulated to by Disciplinary Counsel, Landya B. McCafferty and Respondent, Charles F. Cleary, by clear and convincing evidence:

1. Mr. Cleary has been licensed to practice law in the State of New Hampshire since the fall of 1990.

2. Mr. Cleary joined Wadleigh, Starr & Peters (the "Wadleigh Firm") in the fall of 1990.

3. Mr. Cleary was an associate attorney in the Wadleigh Firm from 1990 until 1996.

4. Mr. Cleary became an income partner of the Wadleigh Firm on January 1, 1997.

5. The focus of Mr. Cleary's practice is in commercial transactions, corporate and real estate law.

6. As an income partner, Mr. Cleary was a subordinate of Mr. Gannon within the Wadleigh Firm's hierarchy.

7. The Wadleigh Firm represented Robert S. LaMontagne and his company LaMontagne Builders, Inc. ("LBI"), from 1984 until 2001. LBI is a corporation engaged in road building, site development, home construction and other construction activities in New Hampshire. Mr. LaMontagne is the principal stockholder and president of LBI.

8. The Wadleigh Firm also represented R. Scott Brooks from 1993 – 1997. Mr. Brooks served as the Director of Development for the Bowman Brook Purchase Group, a New Hampshire limited partnership ("the Partnership").

9. William S. Gannon was the primary responsible attorney for both Mr. LaMontagne and Mr. Brooks at all relevant times.

10. In that capacity, Mr. Gannon assigned matters involving each client to other attorneys in the Wadleigh Firm.

11. Mr. Cleary worked almost exclusively for Mr. Gannon between 1993 and 1997, much of the work being for Mr. LaMontagne and some for Mr. Brooks.

12. After Mr. Cleary became an income partner of the Wadleigh Firm, he continued to

report to Mr. Gannon on the matters involving Mr. LaMontagne and Mr. Brooks.

13. Mr. Gannon retained supervisory authority over Mr. Cleary's work on these matters.

14. In 1994, Mr. Gannon opened a joint file under which the Wadleigh Firm represented both Mr. LaMontagne and Mr. Brooks with respect to a subdivision known as Bowman Green ("the Subdivision"). The Partnership, which Mr. Brooks controlled, owned the Subdivision.

15. In July 1994, under the direction and supervision of Mr. Gannon, a notice of conflict letter was prepared by Mr. Cleary. Both Mr. LaMontagne and Mr. Brooks agreed to the terms of that letter.

16. Mr. Cleary was asked to assist the clients in certain real estate matters involving the Subdivision under the supervision of Mr. Gannon.

17. Mr. Brooks and Mr. LaMontagne anticipated entering into a joint venture to develop the Subdivision.

18. The Partnership was subject to an outstanding judgment in favor of the Federal Deposit Insurance Corporation ("FDIC"). Mr. Brooks had personally guaranteed that lien. Mr. Brooks' initial purpose in the joint venture was primarily to raise money to satisfy his personal guaranty to the FDIC. Mr. LaMontagne's initial purpose was to acquire land to build houses.

19. At some point in late 1996, Mr. LaMontagne and Mr. Brooks had a dispute over the terms of the joint venture, and the plans for the joint venture fell through.

20. Mr. Cleary understood that Mr. LaMontagne refused to enter into the joint venture

because he did not completely trust Mr. Brooks. Mr. LaMontagne explained to Mr. Cleary that he could not trust Mr. Brooks because, in his opinion, Mr. Brooks would change the terms of the deal after he had initialed the terms. Mr. LaMontagne had multiple differences with Mr. Brooks but continued to work with Mr. Brooks on other projects after December, 1996.

21. In the fall of 1996, Mr. LaMontagne (on behalf of LBI) and Mr. Brooks (on behalf of the Partnership) entered into a contract for LBI to build roads and make infrastructure improvements in the Subdivision (the "Contract").

22. Mr. Cleary and the Wadleigh Firm were not involved in the preparation or negotiation of the Contract.

23. In November 1996, Mr. Cleary assisted Mr. Brooks in creating Bowman Green Development Corporation ("BGDC"), a New Hampshire corporation. Mr. Brooks served as an officer of BGDC. The purpose of BGDC was to purchase the Subdivision from the Partnership. Mr. Cleary understood that BGDC would assume the Contract in the event that BGDC acquired the Subdivision.

24. By the end of November 1996, LBI completed the road construction and nearly all of the infrastructure improvements in the Subdivision.

25. Also in November 1996, Mr. Brooks applied to Centerpoint Bank for a loan ("the Loan") to develop the Subdivision.

26. In his Loan application, Mr. Brooks submitted a package of written materials, including financial statements and a description of the project. The financial statement represented that BGDC had over one million dollars in assets and a total liability of

$687,000, in the form of a note payable to Great Oaks Family Holdings, L.P. ("Great Oaks"), an entity controlled by Mr. Brooks and his father. The description of the project stated that the infrastructure had already been built. Mr. Brooks did not mention in this loan application that any money was owed, or would be owed, to LBI.

27. On December 10, 1996, LBI sent Mr. Brooks a bill for $315,459, which represented the entire Contract price for the roadwork, plus "extras," and less credits for minor portions of the Contract that had not yet been completed.

28. Mr. Brooks refused to pay the bill, and LBI halted all work on the site.

29. Shortly thereafter, Mr. LaMontagne informed Mr. Cleary that Mr. Brooks refused to pay his bill. Mr. Cleary was aware of Mr. Brooks' stated reasons for not paying LBI's bill, and Mr. Cleary considered them "phony" and unjustified.

30. At some point in late 1996, a dispute arose between Mr. LaMontagne and Mr. Brooks as a result of Mr. Brooks' nonpayment for road construction work performed by LBI in the Bowman Green Project pursuant to the Contract.

31. As a result of the nonpayment, Mr. Cleary advised both Mr. LaMontagne and Mr. Brooks that he could not represent them any further in the matter until the dispute was resolved.

32. Mr. Cleary reported the dispute to Mr. Gannon.

33. Mr. Gannon said that he did not believe it was a serious dispute.

34. Between December 1996 and throughout the Spring of 1997, Mr. LaMontagne kept Mr. Cleary updated on Mr. Brooks' continued failure to pay the bill.

35. In early 1997, Mr. Brooks called Mr. Cleary to tell him that he (Mr. Brooks) and

Mr. Gannon had negotiated a construction loan ("the Loan") from Centerpoint Bank for the Subdivision.

36. In February 1997, Mr. Brooks requested Mr. Cleary to represent him in the closing of the Loan.

37. Mr. Cleary refused to represent Mr. Brooks at the closing of the loan.

38. Mr. Cleary told Mr. Brooks he believed a conflict of interest existed because of the Contract dispute.

39. At this time, Mr. Cleary did not believe Mr. Brooks had any legitimate basis for disputing the obligation. Rather, Mr. Cleary believed Mr. Brooks was offering phony excuses to avoid paying Mr. LaMontagne.

40. Mr. Cleary received a visit from an outraged Mr. Gannon stating that Mr. Brooks had informed him Mr. Cleary was being uncooperative.

41. Mr. Gannon demanded to know why Mr. Cleary would not close the loan.

42. Mr. Cleary cited the conflict of interest as a result of the payment dispute.

43. Mr. Gannon told Mr. Cleary there was no conflict. Mr. Gannon pressured Mr. Cleary to handle the loan closing.

44. Mr. Cleary believed he could represent Mr. Brooks in the loan closing only if Mr. Brooks promised to pay Mr. LaMontagne and Mr. LaMontagne consented.

45. Mr. Cleary informed Mr. Brooks that he would only represent him in the loan closing if he agreed to pay Mr. LaMontagne in full from the loan proceeds.

46. Mr. Brooks agreed to pay Mr. LaMontagne from the loan proceeds.

47. Mr. Cleary sought and obtained consent to the conditional representation from Mr.

LaMontagne.

48. On April 14, 1997, Mr. Cleary drafted a memorandum to the file describing these discussions. In relevant part, the memorandum states: "I told [Brooks] that I would not represent him in the closing unless I had his assurance that he would pay LaMontagne in full from the proceeds. [Brooks] assured me he would. He stated he understands it would be a potential conflict for me to represent him and leave LaMontagne unpaid. Relying on this representation, I will limit my work to closing the loan with Centerpoint."

49. The loan closed on April 30, 1997. Present at the closing were Mr. Cleary, Mr. Brooks, Attorney J. Jefferson Davis (Bank's counsel), and Mr. David Cassidy (loan officer). Mr. Brooks again confirmed to Mr. Cleary his intention to pay Mr. LaMontagne and executed affidavits under oath to Centerpoint Bank that all work performed on the Subdivision had been paid or would be paid from the loan proceeds.

50. The Centerpoint Bank was never made aware of the agreement Mr. Cleary had entered into with Mr. Brooks and Mr. LaMontagne, i.e., conditioning Mr. Cleary's representation of Mr. Brooks at the closing on Mr. Brooks' promise to pay LBI in full from the loan proceeds. The Centerpoint Bank loan officer believed, on the basis of false representations made out of Mr. Cleary's presence by Mr. Brooks, that all of the site work performed by LBI had been paid for by Great Oaks.

51. At the closing, Mr. Brooks signed, on behalf of BGDC and Great Oaks, the financial statements originally submitted to the Bank. These financial statements did not indicate that there was any debt owed to LBI. Mr. Brooks added the notation, "I represent no material change."

52. Mr. Cleary did not review these financial statements either before or during the closing, and Mr. Cleary was not aware that Mr. Brooks had added any notation to them. Before and during the closing, Mr. Cleary believed that the Bank was aware of the debt to LBI.

53. As the agent for the title insurance company insuring the title to the Subdivision, Mr. Cleary prepared two "Mechanic's Lien/Parties in Possession Affidavits" for Mr. Brooks' signature that included the following language:

> The undersigned, at present, and for a period of 120 days past, have caused no construction, erection, alteration or repairs of any structures or improvements on the premises cited to be done, nor have contracted for any material to be delivered to the premises, **or, if any such construction, erection, alteration or repairs have been made, or materials ordered, the undersigned will promptly [pay] for all costs.** In the event the undersigned fails to do so, the undersigned agrees to defend, indemnify and hold the Bank and any title insurance company insuring the premises harmless for any and all actions, damages and judgments resulting from such failure to pay.

(Emphasis added).

54. Mr. Cleary also notarized Mr. Brooks' signature on these affidavits. The affidavits are identical in every respect, except that Mr. Brooks signed in a different corporate capacity on each. On one affidavit, Mr. Brooks signed for the seller of the Subdivision (the Partnership), and, on the other, he signed as the purchaser of the Subdivision (BGDC).

55. Where an affiant to a "mechanic's lien/parties in possession affidavit" states that he will "promptly" pay for any outstanding work on the subject property, Mr. Cleary's experience is that affiants will pay such bills within a few days of funds being disbursed.

56. These affidavits were necessary to allow the Wadleigh Firm, as agent of Lawyers Title Insurance Corp., to write a lender's title insurance policy with no mechanic's lien exceptions for the Subdivision. Without these affidavits, the Bank would not have issued the Loan.

57. As part of the closing, the Partnership transferred the Subdivision property to BGDC, which then completed the loan transaction with the Bank. The purpose of the transfer was to allow BGDC to borrow $840,000 from the Bank.

58. In connection with the Loan, Mr. Brooks, on behalf of BGDC, executed a promissory note to the Bank and granted the Bank a mortgage on the Subdivision.

59. Mr. Cleary believed Mr. Brooks would pay Mr. LaMontagne from the loan proceeds as he had promised. As a result, Mr. Cleary did not believe it was necessary to take any steps at the closing to insure that Mr. Brooks paid LBI from the proceeds.

60. On the date of the closing, BGDC received $350,000 of the bank Loan. BGDC had an additional $490,000 available on a line of credit from April 30, 1997 until June 20, 1997.

61. On the date of the closing, Mr. Davis, on behalf of the bank, caused the mortgage from BGDC to be recorded in the Hillsborough County Registry of Deeds. At that time, Mr. Davis also updated the title on the Subdivision and found no additional encumbrances recorded.

62. Mr. Brooks subsequently refused to pay Mr. LaMontagne as promised.

63. After it became clear that Mr. Brooks had breached his promise to pay Mr. LaMontagne, Mr. Cleary asked Mr. Gannon to investigate why Mr. Brooks had not paid.

64. Mr. Gannon stated he was aware Mr. Brooks had promised payment and that only

he, Mr. Gannon, could get Mr. Brooks to pay and would do so for the Wadleigh Firm's benefit.

65. Mr. LaMontagne advised Mr. Cleary that payment was still not forthcoming some weeks following the loan closing.

66. On or about May 15, 1997, Mr. Cleary prepared a draft letter to send to both clients withdrawing from all matters in which Mr. LaMontagne and Mr. Brooks were involved and recommending counsel to Mr. LaMontagne to pursue a mechanics lien or other collection against Mr. Brooks.

67. Mr. Gannon instructed Mr. Cleary not to send the letter and not to recommend other counsel for Mr. LaMontagne.

68. Mr. Gannon again stated that it was not a serious dispute and that he would handle it through mediation.

69. Mr. Gannon redrafted the letter as one to both clients for Mr. Cleary's signature. The redrafted letter is dated May 21, 1997.

70. The May 21, 1997 letter recognizes "some disagreements" between Mr. Brooks and Mr. LaMontagne, and recommends mediation to settle those disagreements.

71. Mr. Cleary later learned that Mr. Gannon did nothing to follow through on mediating the dispute.

72. According to Mr. LaMontagne, at some point following the closing, Mr. Brooks gave Mr. LaMontagne a list of additional work Mr. Brooks wanted done on the Subdivision. Mr. Brooks told Mr. LaMontagne that, once this additional work was completed, he would pay LBI. Mr. Cleary advised Mr. LaMontagne to do the additional work. LBI did

approximately $35,000 of additional work on the Subdivision. Mr. Brooks then claimed that the work was unsatisfactory, and that he would not pay LBI. Mr. Cleary has no recollection of this event.

73. In June or July 1997, Mr. Cleary recommended other counsel to Mr. LaMontagne. Mr. Cleary did this without Mr. Gannon's knowledge. With the assistance of new counsel, on August 1, 1997, Mr. LaMontagne obtained a mechanics lien attachment in the amount of $375,000 on the Subdivision.

74. Mr. Cleary solicited the help of two senior partners of the Wadleigh Firm, William Tucker and Kathleen Sullivan, to meet with Mr. Gannon to resolve the matter.

75. At that meeting, Mr. Gannon again agreed to get Mr. Brooks to pay the outstanding amount due Mr. LaMontagne or at least bond over the attachment.

76. Mr. Gannon continued to represent Mr. Brooks throughout this time while Mr. Cleary argued to the Wadleigh Firm that Mr. Brooks should be immediately terminated as a client.

77. Mr. Cleary continued to represent Mr. LaMontagne on unrelated legal matters until 2001 at which time Mr. LaMontagne terminated his relationship with the Wadleigh Firm.

78. In August or September 1997, the title company, Lawyer's Title Insurance Corporation, directed certain questions to Mr. William Tucker, a partner in the Wadleigh Firm, in his capacity as agent for the title company. By letter dated September 26, 1997, Mr. Cleary responded to those questions on behalf of the Wadleigh Firm.

79. The September 26, 1997 letter included the following: ". . . We understand that [BGDC] will fully bond over the Mechanic's Lien filed against the mortgaged premises.

Upon your receipt of this bond, this should resolve this particular claim. . . ." Mr. Cleary's understanding was based on a statement made by Mr. Gannon during the meeting with Mr. Tucker. Mr. Cleary understood that Mr. Gannon was still speaking directly with Mr. Brooks about LBI's Mechanic's Lien.

80. In a letter dated October 1, 1997, Mr. Davis (Bank's lawyer) wrote to the Partnership and Great Oaks about LBI's lien. In that letter, Mr. Davis wrote:

> It is our understanding, based on a letter from Charles F. Cleary, Esquire, of Wadleigh, Starr, Peters, Dunn & Chiesa, dated September 26, 1997 that you intend to bond over the mechanics' lien. Please provide the Bank and the undersigned, in writing, the status of your efforts to obtain a bond, including information on the bonding company and the form of the proposed bond. We appreciate the fact that you have taken the initiative to obtain a bond in an effort to cure this default.

Mr. Davis copied two individuals on his letter: Mr. Cleary and Mr. Cassidy (Loan Officer).

81. Mr. Brooks did not pay LBI, nor did Mr. Brooks take any action to "bond over the lien."

82. Subsequently, Mr. LaMontagne filed suit against Mr. Brooks, and the matter went to arbitration. On May 10, 2001, the arbitrator issued an award in favor of LBI in the amount of $465,292.85.

83. On March 30, 2001, Mr. LaMontagne filed a legal malpractice lawsuit in Hillsborough County Superior Court against Mr. Cleary, Mr. Gannon, and the Wadleigh firm.

84. In late 1999, while the arbitration was pending, the Bank commenced foreclosure on the Subdivision. LBI then filed an action in the Hillsborough County Superior Court to

enjoin the foreclosure sale and claimed that the transfer of the Subdivision from the Partnership to BGDC was fraudulent as to LBI.

85. By Order dated July 1, 2002, the Superior Court (Sullivan, J.) denied LBI's requests to enjoin the bank's foreclosure and to set aside the conveyance. However, Judge Sullivan ruled that LBI was entitled to (a) a judgment in the amount of $465,292.85 against Mr. Brooks personally; and (b) an award against Mr. Brooks personally, the Partnership, and BGDC for "all of the costs, expenses and attorney's fees it has incurred in pursuit of payment for its services." See LaMontagne Builders, Inc. v. Bank of New Hampshire, No. 00-E-0011, slip op. at 20-22 (N.H. Super. Ct., July 1, 2002).

86. Mr. Brooks appealed that Order to the New Hampshire Supreme Court. On November 24, 2003, the Supreme Court affirmed Judge Sullivan's Order. See LaMontagne Builders, Inc. v. Bowman Brook Purchase Group, 150 N.H. 270 (2003).

87. In the Stipulation, Mr. Cleary has admitted every material allegation contained in the Notice of Charges. Additionally, Mr. Cleary has admitted each of the alleged violations of the Rules of Professional Conduct contained in the Notice of Charges.

II. RULINGS OF LAW

The above-listed facts having been found by clear and convincing evidence, the Professional Conduct Committee concludes that there is clear and convincing evidence that Charles F. Cleary has violated the Rules of Professional Conduct as follows:

88. Mr. Cleary's conduct, as detailed above, in representing Mr. Brooks at the closing and continuing to represent both Mr. Brooks and Mr. Lamontagne thereafter constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.7(a) and 1.7(b).

89. Mr. Cleary's conduct, as detailed above, in drafting the September 26, 1997 letter to David A. Miller of Lawyers Title Insurance Corporation constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.9(a).

90. Mr. Cleary's conduct, as detailed above, in failing to withdraw from the representation of Mr. Brooks and Mr. Lamontagne despite being aware of the conflict between them constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.16(a)(1).

91. In light of the evidence of the above Rules violations, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

92. Mr. Cleary stipulated that were this matter to proceed to a hearing, the evidence would be clear and convincing that his conduct in this case was directed by Mr. Gannon, and was contrary to Mr. Cleary's judgment at the time. Nonetheless, Mr. Cleary stipulated that N.H. R. Prof. Conduct 5.2 prevents a more junior attorney, such as himself, from following directions of more senior attorneys, such as Mr. Gannon, where those directions would result in violations of the Rules of Professional Conduct.

III. DISCUSSION

Following two oral arguments and a careful review of the record by the PCC panel members sitting, there was lengthy debate regarding the appropriate sanction to be imposed. It was proffered that the sanction of a reprimand was not harsh enough in view of the number of violations committed, the serious nature of the violations, and particularly because of the substantial financial loss to Robert LaMontagne. Substantial deference, however, was given by the majority to the recommendation of the hearing panel and Disciplinary Counsel, and the fact that the issue of the appropriate sanction was extensively addressed at the hearing panel level and included testimony of Robert LaMontagne.

IV. SANCTION

Having made the aforementioned findings and rulings, the Professional Conduct Committee, by majority vote, concludes that the appropriate discipline in this matter is a Reprimand. This sanction is in accord with the purposes of attorney discipline as described by The N.H. S. Ct See, e.g., Feld's Case, 149 NH 19, 28 (2002). This sanction is also in accord with the ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1991). See, e.g., Shillen's Case, 149 N.H. 132, 139 (2003) (noting that, although the Court has never formally adopted these Standards, the Court has "considered them when imposing sanctions").

93. Mr. Cleary has agreed to accept a Reprimand for his conduct.

94. A Reprimand is the appropriate sanction in this matter. While the matter involves a serious conflict, and Mr. LaMontagne suffered a large injury, there are numerous mitigating factors which counsel in favor of a Reprimand. See ABA Center for Professional Responsibility Standards for Imposing Lawyer Sanctions § 9.0 (1991); Shillen's Case, 149 N.H. 132, 139 (2003) (noting that, although the Court has never formally adopted these Standards, the Court has "considered them when imposing sanctions"). The relevant applicable mitigating factors listed in ABA Standards § 9.32 are as follows:

(a) Absence of a prior disciplinary record. Mr. Cleary has no prior disciplinary record.

(b) Absence of a dishonest or selfish motive. Mr. Cleary did not act with a dishonest or selfish motive when he represented Mr. LaMontagne and Mr. Brooks. To the contrary, Mr. Cleary's motive from the beginning was to stay out of the conflict between these two clients. Mr. Cleary represented the clients at the direction of Mr. Gannon, his supervisor at the Wadleigh Firm. Mr. Gannon was outraged by Mr. Cleary's decision not to represent Mr. Brooks at the closing. Mr. Gannon expressed that outrage on more than one occasion to Mr. Cleary. Mr. Cleary should have persisted in his original refusal to get involved with Mr. LaMontagne and Mr. Brooks after their Contract dispute. He agrees that his failure to

rebuff Mr. Gannon has resulted in his misconduct. There is no question, however, but that Mr. Cleary's motives were neither selfish nor dishonest. After succumbing to Mr. Gannon's pressure and agreeing to represent Mr. Brooks at the closing, Mr. Cleary's motive was to ensure that Mr. Brooks pay Mr. LaMontagne. Indeed, he conditioned his representation on that event. In short, Mr. Cleary's misconduct was a result of poor judgment, not selfish motives.

(c) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings. In all his dealings with Disciplinary Counsel, Mr. Cleary has been completely cooperative, forthcoming, and eager to accept responsibility for his misconduct.

(d) Character or reputation. Mr. Cleary has an excellent character and reputation. See Letters regarding Mr. Cleary, attached to this Stipulation as Exhibit 2. Having met with Mr. Cleary at length, Disciplinary Counsel can attest to his character.

(e) Remorse. Mr. Cleary has expressed remorse for his behavior. Specifically, Mr. Cleary has expressed remorse for the harm and frustration that his behavior caused Mr. LaMontagne, a man whom Mr. Cleary holds in high regard.

95. While the ABA Standards § 9.32 list thirteen mitigating factors, the list is not all-inclusive. Indeed, the Commentary to ABA Standards § 9.1 states, in relevant part, "Each disciplinary case involves unique facts and circumstances. . . ." With that as a backdrop, there is one unique circumstance in this matter that deserves attention and should act as mitigation.

a. The role of Mr. Gannon in this matter has been discussed above. The evidence is clear and convincing that Mr. Gannon, as Mr. Cleary's supervising partner for matters involving these two clients, played a

significant role behind the scenes directing Mr. Cleary's actions. In Mr. LaMontagne's July 23, 2001, letter of complaint, he correctly included Mr. Gannon. By letter dated May 28, 2003, the Professional Conduct Committee dismissed the matter as to Mr. Gannon with a finding of "no professional misconduct" and with a warning about being "more sensitive to conflicts between existing clients, assur[ing] that any waivers be reduced to writing and to more closely supervise less experienced attorneys working for him."

b. While the Committee's decision with respect to Mr. Gannon is not subject to challenge, it is a decision which will necessarily stand alongside whatever sanction the Committee decides to issue in Mr. Cleary's case. In light of the unique facts presented in this case (i.e., the mitigating factors listed above and Mr. Gannon's role as Mr. Cleary's supervising partner), the Committee's finding of "no misconduct with a warning" as to Mr. Gannon is a mitigating factor as to Mr. Cleary.

c. Finally, ABA Standards § 4.3, begins its discussion as follows: "Absent aggravating or mitigating circumstances, . . . the following sanctions are generally appropriate in cases involving conflicts of interest . . . ." (Emphasis added). In this matter, there are numerous mitigating circumstances, as discussed above, and no aggravating factors. In light of the mitigating factors, and considering the unique circumstances of this case, a Reprimand is consistent with ABA Standards §§ 4.3 & 9.0.

V. CONCLUSION

For all of the above reasons, the Professional Conduct Committee sanctions Charles F. Cleary for violating N.H. Rules of Professional Conduct: 1.7(a), 1.7(b), 1.9(a), 1.16(a)(1) and 8.4(a), with a **REPRIMAND**.

Date: 11/16/04

By: Benette Pizzimenti
Benette Pizzimenti, Esq.
Chair

c.c. Charles F. Cleary, Esq.
John Kissinger, Esq.
Landya B. McCafferty, Esq.
Robert LaMontagne
File