

New Hampshire Supreme Court

Professional Conduct Committee

Margaret H. Nelson, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
David N. Cole
Thomas P. Connair
Alan J. Cronheim
Eleanor Wm. Dahar

4 Park Street, Suite 304
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Gerald A. Daley*
Gretchen Rule Hamel
James R. Martin
David N. Page*
Stephen B. Stepanek*
* non attorney member

Holly B. Fazzino, Admin. Coordinator

Sessler, James N. advs. Hope McDonald # 03-076

**REPRIMAND
and
ORDER ON MOTIONS**

On January 17, 2006, the Professional Conduct Committee considered the matter.

Members present included: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, David N. Cole, Alan J. Cronheim, Eleanor Wm. Dahar, Gretchen Rule Hamel, James R. Martin, David N. Page. Gerald A. Daley abstained.

The Professional Conduct Committee, upon consideration, granted Disciplinary Counsel's Motion for Reconsideration, dated December 19, 2005.

The Committee then granted Disciplinary Counsel's Motion to Permit Waiver of Hearings Committee Process, dated December 5, 2005.

Both motions are attached to this Order and made a part thereof.

I. FACTUAL FINDINGS

The Professional Conduct Committee determined that the record supports the findings of fact by clear and convincing evidence as set forth in the Stipulation which is attached as Exhibit 2 in the Motion to Permit Waiver of Hearings Committee Process.

II. RULINGS OF LAW

The Professional Conduct Committee concludes that James N. Sessler violated the Rules of Professional Conduct: Rule 1.1(a): Competence; 1.4: Client Communications; 8.4(a): Misconduct.

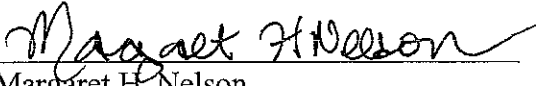
III. SANCTION

The Professional Conduct Committee concludes that the appropriate discipline in this matter is a Reprimand. This sanction is in accord with the purpose of attorney discipline as described by the New Hampshire Supreme Court and with the ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1991). *See, e.g., Wolterbeek's Case*, No. LD 2005-002, slip op. at 2 (N.H., October 31, 2005) (noting that although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

IV. CONCLUSION

For the above reasons, the Professional Conduct Committee issues this Reprimand to James N. Sessler for violating N.H. Prof. Conduct Rules: 1.1(a); 1.4, and 8.4(a). Mr. Sessler is assessed all costs associated with the investigation and prosecution of this matter.

January 20, 2006


Margaret H. Nelson
Chair

Distribution:

Landya B. McCafferty, Disciplinary Counsel
James N. Sessler, Esquire
File

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

Sessler, James N.

advs.

Hope McDonald

#03-076

MOTION FOR RECONSIDERATION

NOW COMES Landya B. McCafferty, Disciplinary Counsel, and respectfully requests that the Professional Conduct Committee reconsider its Order dated December 14, 2005, denying Disciplinary Counsel's Motion to Permit Waiver of Hearings Committee Process.

In support, Disciplinary Counsel states as follows:

1. In its Order dated December 14, 2005, the Committee denied without prejudice undersigned counsel's Motion to Permit Waiver of Hearings Committee Process, noting that undersigned counsel neglected to address in the Notice of Charges and the Stipulation the issue of Mr. Sessler's lack of diligence related to the prosecution of the McDonald's lawsuit against the birthmother.

2. Undersigned counsel respectfully submits that the Committee did not have available to it certain material facts bearing on undersigned counsel's charging decision in this case.
3. Undersigned counsel elected not to charge a Rule 1.3 violation with respect to Mr. Sessler's failure to file the McDonald's lawsuit for the following reasons:
 - Mr. Sessler's inaction with respect to the filing of the lawsuit covered a two-month time frame.
 - Mr. Sessler would testify that he drafted the writ but did not file the lawsuit because he was waiting (a) to receive a retainer from the McDonalds, and (b) to hear that they did, in fact, want him to go forward.
 - During this time frame, the McDonalds telephoned Mr. Sessler and learned from a secretary that the lawsuit had been filed. It is not clear how many phone calls the McDonalds made to Mr. Sessler thereafter, but Mr. Sessler would testify that any such phone messages did not get forwarded to him.
 - During this time frame, Mr. Sessler was in the process of opening a branch office in Franklin and relocating the bulk of his law practice from Laconia to Franklin. Mr. Sessler also acquired a new secretary in the Franklin branch office at this time. Mr. Sessler's firm

experienced technical difficulties with their computer server during this time frame, which difficulties negatively impacted the firm's internal communication with regard to phone messages.

- Mr. Sessler believes that his failure to receive phone messages may be attributable to these difficulties. Indeed, after the fact and while this PCC complaint was pending, Mr. Sessler was able to locate on the server two messages from the McDonalds that he did not receive.
- In any event, Mr. Sessler would testify that, during this two-month time frame, he did not receive a message that the McDonalds had telephoned him. Mr. Sessler would testify that, having advised the McDonalds that they were unlikely to prevail, he assumed that they had decided not to pursue the lawsuit.
- Mr. Sessler was credible on this issue. His credibility was enhanced because he had been so candid in admitting his other shortcomings.
- Moreover, although two months had elapsed, the statute of limitations had not expired, and the

McDonald's interests were not in any other way prejudiced by Mr. Sessler's lapse.

- Mr. Sessler offered the McDonalds the option of having someone else in his firm handle the lawsuit, but the McDonalds understandably elected not to deal further with Mr. Sessler and his law firm.

4. For the above reasons, undersigned counsel concluded that Mr. Sessler's misconduct with respect to his failure to file the lawsuit was more of a communication (Rule 1.4) rather than a diligence (Rule 1.3) problem.

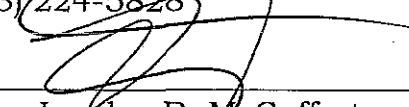
WHEREFORE, Disciplinary Counsel respectfully requests that this Honorable Committee:

- (A) Grant this "Motion To Reconsider";
- (B) Grant Disciplinary Counsel's previously filed Motion to Permit Waiver of Hearings Committee Process; and
- (C) Grant such other relief as is fair and in the public interest.

Respectfully submitted,

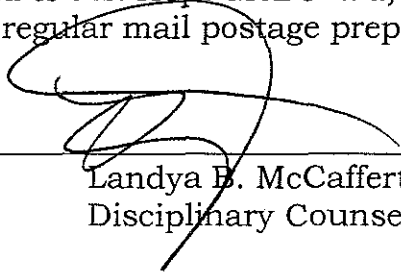
New Hampshire Supreme Court
Attorney Discipline Office
4 Park Street, Suite 304
Concord, New Hampshire 03301
(603) 224-5828

Dated: December 19, 2005

By: 
Landya B. McCafferty
Disciplinary Counsel

CERTIFICATION

I, Landya B. McCafferty, Disciplinary Counsel of the New Hampshire Supreme Court Attorney Discipline Office, certify that a copy aforesaid "Motion To Reconsider" is being sent on this 19th day of December 2005, to James N. Sessler, Esquire, Fitzgerald, Sessler & Nichols, PA, 359 Central Street, Franklin, New Hampshire 03235, and to Ms. Hope McDonald, 72 Main Street, Andover, New Hampshire 03216, by regular mail postage prepaid.



Landya B. McCafferty
Disciplinary Counsel

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

Sessler, James N.

advs.

Hope McDonald

#03-076

MOTION TO PERMIT
WAIVER OF HEARINGS COMMITTEE PROCESS

NOW COMES Landya B. McCafferty, Disciplinary Counsel, and respectfully requests that the Professional Conduct Committee permit all parties to waive the process before the Hearings Committee and seek a ruling from the Professional Conduct Committee in this matter.

In support, Disciplinary Counsel states as follows:

1. On November 15, 2005, Disciplinary Counsel issued a Notice of Charges in this matter. (A copy of the Notice of Charges is attached hereto as Exhibit 1.)
2. Disciplinary Counsel and Mr. Sessler have executed a "Stipulation" dated December 1, 2005 and December 5, 2005. (A copy of the "Stipulation" is attached as Exhibit 2.)

3. In that "Stipulation," Mr. Sessler conceded all allegations contained in the Notice of Charges and agreed that a Reprimand was the appropriate sanction.
4. Hope McDonald, the complainant, is in agreement with the Stipulation and with this pleading but she would prefer a more severe sanction. However, Ms. McDonald does not have the desire to appear before the Hearings Committee to make an argument on sanction.
5. Disciplinary Counsel discussed with Mr. Sessler and Ms. McDonald the possibility of waiving the hearing before the Hearings Committee and seeking a more expeditious result directly from the Professional Conduct Committee.
6. Disciplinary Counsel finds support for the proposition that the parties can seek a waiver of the process before the Hearings Committee in the "Preface" to N.H. Sup. Ct. R. 37A(III). That Rule states: "As good cause appears and as justice may require, the professional conduct committee may waive the application of any rule under this section."
7. Where, as is the case here, the Respondent and Disciplinary Counsel have entered into a stipulation on both facts and sanction, and all parties, including the complainant, agree to waive the Hearings Committee process, there is "good cause" to permit the

parties to waive the Hearings Committee process and seek the Committee's ruling on the pleadings.

8. All parties agree that this request is made in an effort to seek a more expeditious result while preserving scarce judicial resources.
9. In the event the Committee grants this request, all parties agree to waive oral argument before the Committee.

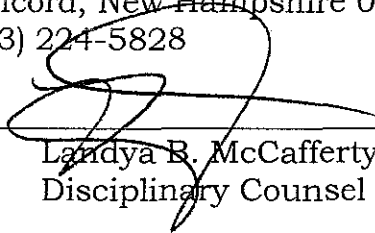
WHEREFORE, Disciplinary Counsel respectfully requests that this Honorable Committee:

- (A) Grant this "Motion To Permit Waiver Of Hearings Committee Process";
- (A) Issue a Ruling on the basis of the Notice of Charges and "Stipulation of Facts and Sanction"; and
- (B) Grant such other relief as is fair and in the public interest.

Respectfully submitted,


New Hampshire Supreme Court
Attorney Discipline Office
4 Park Street, Suite 304
Concord, New Hampshire 03301
(603) 224-5828

Dated: December 5, 2005

By: 
Landya B. McCafferty
Disciplinary Counsel

CERTIFICATION

I, Landya B. McCafferty, Disciplinary Counsel of the New Hampshire Supreme Court Attorney Discipline Office, certify that a copy aforesaid "Motion To Permit Waiver Of Hearings Committee Process" is being sent on this 5th day of December 2005, to James N. Sessler, Esquire, Fitzgerald, Sessler & Nichols, PA, 11 Academy Street, Laconia, New Hampshire 03246 and to Ms. Hope McDonald, 72 Main Street, Andover, New Hampshire 03216, by regular mail postage prepaid.



Landya B. McCafferty
Disciplinary Counsel

NEW HAMPSHIRE SUPREME COURT
ATTORNEY DISCIPLINE OFFICE



Sessler, James N.

advs.

Hope McDonald

#03-076

NOTICE OF CHARGES

1. This Notice of Charges is issued pursuant to New Hampshire Supreme Court Rule 37A(III)(b)(2). In accordance with that Rule, this Notice of Charges sets forth both the allegations of misconduct against James N. Sessler, Esq., as well as the disciplinary rules alleged to have been violated.

Summary of Allegations

2. In a sworn letter of complaint dated August 4, 2003, Hope and Budd McDonald asserted allegations of professional misconduct against Mr. Sessler.
3. Mr. Sessler is an attorney licensed to practice law in New Hampshire. Mr. Sessler was admitted to practice in 1976. At all times material to this proceeding, Mr. Sessler operated his law office as Fitzgerald, Sessler & Nichols, PA, at 11 Academy Square, Laconia, New Hampshire 03246.

Mr. Sessler's current address is Fitzgerald, Sessler & Nichols, PA, at 359 Central Street, Franklin, New Hampshire 03235.

4. On or about October 26, 2001, the McDonalds retained Mr. Sessler to represent them in adopting a baby that was due in December 2001.
5. During the initial meeting with Mr. Sessler, he informed the McDonalds that they first needed a home study, which the McDonalds then had completed in November 2001. Mr. Sessler also informed the McDonalds that the birth mother would not have to appear in court before the judge, and that only the McDonalds would have to appear in court.
6. The baby was born on December 2, 2001. On December 5, 2001, the McDonalds brought the baby to their home from the hospital. On December 6, 2001, Ms. McDonald learned that the birth mother had changed her mind. The McDonalds returned the baby to the birth mother.
7. In March 2002, the birth mother contacted Ms. McDonald and indicated a renewed desire to give the baby up for adoption. The McDonalds expressed their desire to adopt the baby and telephoned Mr. Sessler.
8. On March 6, 2002, Ms. McDonald met with Mr. Sessler at his office. Ms. McDonald made clear to Mr. Sessler that she did not want to go through the heartache of losing the baby again. She asked Mr. Sessler what she could do to prevent that from happening again. Mr. Sessler did not explain to Ms. McDonald that there was nothing she could do to prevent

the birth mother from repeating the events of the previous failed adoption.

9. Rather, Mr. Sessler advised the McDonalds to come to his office to obtain two consent forms. He instructed them to take one consent form to the birth father at the New Hampshire State Prison, and have him sign the form in front of a notary. The McDonalds complied.
10. Mr. Sessler further instructed the McDonalds to take the birth mother to a notary, and have the birth mother sign a consent form in front of a notary. The McDonalds complied.
11. On March 27, 2002, the birth mother delivered the baby to the McDonalds.
12. Based upon Mr. Sessler's explanations, the McDonalds understood that once they obtained the birth parents' notarized signatures on the consent forms, the only remaining step toward finalizing the adoption was the McDonalds appearance before a judge.
13. While awaiting news of the court date, Ms. McDonald learned that the birth mother's consent form was inaccurate in some respect. Mr. Sessler advised Ms. McDonald to have the birth mother sign a corrected form, once again in front of a notary. Ms. McDonald complied once again.
14. In May 2002, the McDonalds renewed their home study and began making preparations for the adoption.

15. In July 2002, Ms. McDonald learned that the birth father had to be taken in front of a judge to sign the proper consent form. On July 24, 2002, the birth father gave his consent in front of the judge.
16. Shortly thereafter, Ms. McDonald learned that the birth mother also had to give her consent in front of the judge. Ms. McDonald was dismayed to learn this, as she understood from Mr. Sessler that the birth mother had already done all that was legally necessary to consent to the adoption. The hearing was scheduled for July 25, 2002.
17. On July 25, 2002, the birth mother refused to give her consent before the judge. The birth mother demanded that the McDonalds return the baby to her immediately. Eight hours thereafter, the birth mother went to the McDonalds' home and retrieved the baby.
18. The McDonalds were understandably devastated by the experience. They sought Mr. Sessler's assistance once again, this time to bring a lawsuit against the birth mother to recover their expenses related to the failed adoption. The McDonalds based their theory of recovery on the birth mother's alleged fraud and misrepresentations regarding the adoption.
19. On August 8, 2002, the McDonalds met with Mr. Sessler at his office to discuss this lawsuit. Mr. Sessler agreed to file a lawsuit against the birth mother on their behalf.
20. On or about September 4, 2002, Mr. Sessler prepared a draft Writ of Summons and forwarded it to the McDonalds for review. On September

5, 2002, Mr. McDonald returned the draft Writ with corrections to Mr. Sessler's office.

21. Thereafter, for the next two months, the McDonalds had a difficult time reaching Mr. Sessler. They wanted to follow-up on the lawsuit and find out whether it had been filed. While they did not receive a return phone call from Mr. Sessler during this time, a secretary in Mr. Sessler's office informed the McDonalds that the lawsuit had been filed.
22. When the McDonalds finally spoke to Mr. Sessler, he informed them that the lawsuit had not been filed because they had not paid the required retainer. Further, Mr. Sessler informed them for the first time that he no longer handled litigation, and that they could have a different lawyer within his firm represent them in the lawsuit.
23. The McDonalds never understood that Mr. Sessler was awaiting a retainer. Indeed, the September invoice contained an entry for drafting the Writ, and the McDonalds had paid that invoice in full. After this conversation with Mr. Sessler, the McDonalds fired him and requested their file.

Disciplinary Rules Violated

24. Mr. Sessler's conduct in this case raises questions under New Hampshire Rules of Professional Conduct **1.1(a); 1.4; and 8.4(a)**.

Rule 1.1(a): Competence

25. By advising the McDonalds to obtain notarized consents from the birth parents and then assuring the McDonalds that no further consent from the birth parents would be necessary, Mr. Sessler gave them inaccurate legal advice.
26. Mr. Sessler advised the McDonalds that, after they obtained the birth parents' separately notarized consents, the only remaining events would be court appearances by the McDonalds. Mr. Sessler's advice in this respect was inaccurate.
27. In so advising the McDonalds, Mr. Sessler failed to provide them with competent representation. See N.H. R. Prof. Conduct 1.1(b)(1).
28. Mr. Sessler's failures in this respect constitutes a violation of N.H. R. Prof. Conduct 1.1(a).

Rule 1.4: Client Communications

29. After the adoption failed for the second time and the McDonalds retained Mr. Sessler to bring a lawsuit against the birth mother, Mr. Sessler failed to keep the McDonalds reasonably informed regarding the status of their lawsuit.
30. After Mr. Sessler drafted the Writ of Summons in September 2002, he did not make further contact with the McDonalds to explain (a) the fact that Mr. Sessler had decided in the meantime to limit his practice such that he would no longer litigate cases (such as their lawsuit against the birth

mother), and (b) the fact that Mr. Sessler had not filed the lawsuit because the McDonalds had not paid him the requested retainer.

31. Mr. Sessler's failures in this regard constitutes a violation of N.H. R. Prof. Conduct 1.4(a) - (c).

Rule 8.4(a): General Rule

32. In the event that any one of the above allegations is proven by clear and convincing evidence, this would necessarily constitute a violation of N.H. R. Prof. Conduct 8.4(a).

Conclusion

33. Mr. Sessler is advised that he must answer this Notice of Charges within 30 days of the date of his receipt of this Notice of Charges. See Sup. Ct. R. 37A(III)(b)(3)(A). Mr. Sessler's answer must be in writing, must respond specifically to each allegation of this Notice of Charges, and must assert all affirmative defenses. See Sup. Ct. R. 37A(III)(b)(3)(B).
34. **In the event Mr. Sessler fails to file an answer, the allegations set forth in this Notice of Charges "shall be deemed to be admitted."** See Sup. Ct. R. 37A(III)(b)(3)(A).
35. It is the duty of Disciplinary Counsel to request that the chair of the Hearings Committee appoint a hearing panel in this matter either upon receiving an answer from Mr. Sessler, or upon the expiration of the 30-day period for him to file an answer. See Sup. Ct. R. 37A(III)(b)(4).

36. Mr. Sessler is advised that he has the right to be represented by counsel, and to testify and present evidence on his own behalf. See Sup. Ct. R. 37A(III)(b)(2).
37. This Notice of Charges and the file of Disciplinary Counsel (other than work product and internal memoranda of the Attorney Discipline Office) is now a public file. Further, the proceedings related to this Notice of Charges that take place before the Hearings Committee and Professional Conduct Committee, as well as the written decisions (other than work product, internal memoranda, and deliberations) of both, shall be public. See Sup. Ct. R. 37(20)(b)(2).
38. Mr. Sessler's attention is also directed to Supreme Court Rule 37A(III)(b)(5), which governs discovery in this matter, as well as subsection (6) of that Rule, which provides for a pre-hearing conference. In the absence of "good cause," such pre-hearing conference must be requested within 30 days of the appointment of a hearing panel in this matter. See Sup. Ct. R. 37A(III)(b)(6)(A).

New Hampshire Supreme Court
Attorney Discipline Office
4 Park Street, Suite 304
Concord, New Hampshire 03301
(603) 224-5828

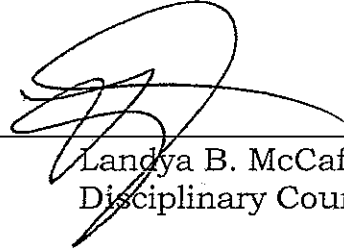
Date: November 15, 2005

By: 

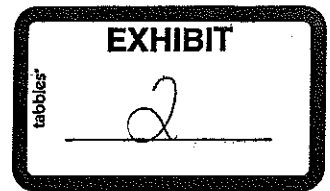
Landya B. McCafferty
Disciplinary Counsel

CERTIFICATION

I, Landya B. McCafferty, Disciplinary Counsel of the New Hampshire Supreme Court Attorney Discipline Office, certify that the original of the aforesaid Notice of Charges is being sent on this 15th day of November 2005, to James N. Sessler, Esquire, Fitzgerald, Sessler & Nichols, PA, 359 Central Street, Franklin, New Hampshire 03235 by certified mail #7000 0600 0029 2998 0664, return receipt requested and a copy by regular mail postage prepaid. A copy has also been sent to Ms. Hope McDonald, 72 Main Street, Andover, New Hampshire 03216.



Landya B. McCafferty
Disciplinary Counsel



NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

Sessler, James N.

advs.

Hope McDonald

#03-076

STIPULATION

Disciplinary Counsel, Landya B. McCafferty, and Respondent, James N.

Sessler, hereby submit this Stipulation in the above-referenced case.

I. Stipulation of Facts

1. In a sworn letter of complaint dated August 4, 2003, Hope and Budd McDonald asserted allegations of professional misconduct against Mr. Sessler.
2. Mr. Sessler is an attorney licensed to practice law in New Hampshire. Mr. Sessler was admitted to practice in 1976. At all times material to this proceeding, Mr. Sessler operated his law office as Fitzgerald, Sessler & Nichols, PA, at 11 Academy Square, Laconia, New Hampshire 03246. Mr. Sessler's current address is Fitzgerald, Sessler & Nichols, PA, at 359 Central Street, Franklin, New Hampshire 03235.

Handwritten initials, possibly "JN", in a cursive style.

3. On or about October 26, 2001, the McDonalds retained Mr. Sessler to represent them in the adoption of a baby that was due in December 2001.
4. During the initial meeting with Mr. Sessler, he informed the McDonalds that they first needed a home study, which the McDonalds then had completed in November 2001. Mr. Sessler failed to explain to the McDonalds that the birthparents would be required to appear before the court in order to consent to the adoption.
5. The baby was born on December 2, 2001. On December 5, 2001, the McDonalds brought the baby to their home from the hospital. On December 6, 2001, Ms. McDonald learned that the birthmother had changed her mind. The McDonalds returned the baby to the birthmother.
6. In March 2002, the birthmother contacted Ms. McDonald and indicated a renewed desire to give the baby up for adoption. The McDonalds expressed their desire to adopt the baby and telephoned Mr. Sessler.
7. On March 6, 2002, Ms. McDonald met with Mr. Sessler at his office. Ms. McDonald made clear to Mr. Sessler that she did not want to go through the heartache of losing the baby again. She asked Mr. Sessler what she could do to prevent that from happening again. Mr. Sessler did not explain to Ms. McDonald that there was nothing anyone could do to prevent the birthmother from repeating the events of the previous failed adoption.

8. Rather, Mr. Sessler advised the McDonalds to come to his office to obtain two consent forms. He instructed them to take one consent form to the birthfather at the New Hampshire State Prison, and have him sign the form in front of a notary. The McDonalds complied.
9. Mr. Sessler further instructed the McDonalds to take the birthmother to a notary, and have the birthmother sign a consent form in front of a notary. The McDonalds complied. At that time, the McDonalds were under the clear impression that the birthparents did not have to appear in court after they signed these consent forms.
10. On March 27, 2002, the birthmother delivered the baby to the McDonalds.
11. Based upon Mr. Sessler's explanations, the McDonalds understood that once they obtained the birthparents' notarized signatures on the consent forms, the only remaining step toward finalizing the adoption was the McDonalds' appearance before a judge.
12. While awaiting news of the court date, Ms. McDonald learned that the birthmother's consent form was inaccurate in some respect. Mr. Sessler advised Ms. McDonald to have the birthmother sign a corrected form, once again in front of a notary. Ms. McDonald complied once again.
13. In May 2002, the McDonalds renewed their home study and began making preparations for the adoption.
14. In late June 2002, Ms. McDonald learned that the birthfather and birthmother had to be taken in front of a judge to testify and give their

consent before the judge. Ms. McDonald was dismayed to learn this, as she understood from Mr. Sessler that the birthparents had already done all that was legally necessary to consent to the adoption. On July 24, 2002, the birthfather gave his consent in front of the judge. The birthmother's hearing was scheduled for July 25, 2002.

15. On July 25, 2002, the birthmother refused to give her consent before the judge. The birthmother demanded that the McDonalds return the baby to her immediately. Eight hours thereafter, the birthmother went to the McDonalds' home and retrieved the baby.
16. The McDonalds were understandably devastated by the experience. They sought Mr. Sessler's assistance once again, this time to bring a lawsuit against the birthmother to recover their expenses related to the failed adoption. The McDonalds based their theory of recovery on the birthmother's alleged fraud and misrepresentations regarding the adoption.
17. On August 8, 2002, the McDonalds met with Mr. Sessler at his office to discuss this lawsuit. Mr. Sessler agreed to file a lawsuit against the birthmother on their behalf.
18. On or about September 4, 2002, Mr. Sessler prepared a draft Writ of Summons and forwarded it to the McDonalds for review. On September 5, 2002, Mr. McDonald returned the draft Writ with corrections to Mr. Sessler's office.

19. Thereafter, for the next two months, the McDonalds had a difficult time reaching Mr. Sessler. They wanted to follow-up on the lawsuit and find out whether it had been filed. While they did not receive a return phone call from Mr. Sessler during this time, a secretary in Mr. Sessler's office informed the McDonalds that the lawsuit had been filed.
20. When the McDonalds finally spoke to Mr. Sessler, he informed them that the lawsuit had not been filed because they had not paid the required retainer. Further, Mr. Sessler informed them for the first time that he no longer handled litigation, and that they could have a different lawyer within his firm represent them in the lawsuit.
21. The McDonalds never understood that Mr. Sessler was awaiting a retainer. Indeed, the September invoice contained an entry for drafting the Writ, and the McDonalds had paid that invoice in full. After this conversation with Mr. Sessler, the McDonalds fired him and requested their file.

II. Stipulation as to Rules Violated

Rule 1.1(a): Competence

22. By advising the McDonalds to obtain notarized consents from the birthparents and then giving the McDonalds the impression that no further consent from the birthparents would be necessary, Mr. Sessler gave the McDonalds incomplete and therefore inaccurate legal advice.
23. Mr. Sessler advised the McDonalds that, after they obtained the birthparents' separately notarized consents, the only remaining events

would be court appearances by the McDonalds. Mr. Sessler's advice in this respect was inaccurate.

24. In so advising the McDonalds, Mr. Sessler failed to provide them with competent representation. See N.H. R. Prof. Conduct 1.1(b)(1).
25. Mr. Sessler's failures in this respect constitute clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.1(a).

Rule 1.4: Client Communications

26. After the adoption failed for the second time and the McDonalds retained Mr. Sessler to bring a lawsuit against the birthmother, Mr. Sessler failed to keep the McDonalds reasonably informed regarding the status of their lawsuit.
27. After Mr. Sessler drafted the Writ of Summons in September 2002, he did not make further contact with the McDonalds to explain (a) the fact that Mr. Sessler had decided in the meantime to limit his practice such that he would no longer litigate cases (such as their lawsuit against the birthmother), and (b) the fact that Mr. Sessler had not filed the lawsuit because the McDonalds had not paid him the requested retainer.
28. Mr. Sessler's failures in this regard constitute clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.4(a) - (c).

Rule 8.4(a): General Rule

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

III. Stipulation as to Sanction

30. Disciplinary Counsel and Mr. Sessler jointly recommend a Reprimand as the appropriate sanction in this matter. A Reprimand would serve the purposes of attorney discipline.
31. Lawyer discipline is not intended to be punishment. See Coffey's Case, 880 A.2d 403, 412 (N.H. 2005). Rather, 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." Id. at 412-13 (internal quotation marks omitted).
32. "The sanction . . . must be sufficient to satisfy those goals. . . . It must take into account both the severity of the misconduct and the mitigating circumstances disclosed by the record." Basbanes' Case, 141 N.H. 1, 6 (1996) (internal quotations and citations omitted).
33. Every case is to be judged "on its own facts and circumstances." See Wolterbeek's Case, No. LD-2005-002, slip op. at 2 (N.H., October 31, 2005) (citing Flint's Case, 133 N.H. 685, 689 (1990)). See also ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions § 9.1 (1992) (hereinafter "Standards") ("Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary sanctions, consideration must necessarily be given to the facts pertaining to the professional misconduct and to any aggravating or mitigating factors"). In imposing sanctions in attorney discipline matters, the

Court looks to the Standards “for guidance.” Wolterbeek’s Case, slip op. at 2.

34. The Standards “list the following facts for consideration 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.’” Wolterbeek’s Case, slip op. at 2 (quoting Standards § 3.0).
35. “In applying these factors, the first step is to categorize the respondent’s misconduct and identify the appropriate sanction. After determining the sanction, [the Court] considers the effect of any aggravating or mitigating factors on the ultimate sanction.” See Wolterbeek’s Case, slip op. at 2.
36. Here, Mr. Sessler’s misconduct falls into two categories. First, he has stipulated that certain legal advice he gave to the McDonalds was incompetent in violation of Rule 1.1(a). Second, he has also stipulated that he failed to communicate properly with the McDonalds in violation of Rule 1.4.
37. Section 4.5 of the Standards addresses the appropriate sanction to be imposed in a case involving an attorney’s incompetence. A Reprimand¹ “is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a

¹The Standards refer to the minimum sanction as an “Admonition.” Although not identical, the closest equivalent in New Hampshire is a “Reprimand.”

legal matter, and causes little or no actual or potential injury to a client.”
See § 4.54. Here, while Mr. Sessler’s incompetent advice caused the McDonalds to suffer no cognizable legal harm (i.e., his misconduct did not cause the birthmother to change her mind), his misconduct unquestionably caused the McDonalds to suffer needless anxiety and stress. Mr. Sessler’s failure to communicate properly with the McDonalds about their lawsuit against the birthmother caused them similar stress and anxiety. A Reprimand is the appropriate baseline sanction in this case.

38. The final question is whether the existence of aggravating or mitigating factors affect the ultimate sanction. Section 9.22 lists numerous factors that may be considered as “aggravating.” Only one of those factors is relevant in this case: Mr. Sessler’s “substantial experience in the practice of law.” See § 9.22(i). Mr. Sessler had been practicing law for approximately twenty-six years at the time of his representation of the McDonalds. Certainly, he should have recognized the need to fine-tune his understanding of adoption law prior to agreeing to represent the McDonalds.
39. Section 9.32 lists numerous mitigating factors, four of which are relevant to this matter: absence of a prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to the disciplinary authority and a cooperative attitude toward the proceedings; and remorse. See Sections 9.32(a), (b), (e), and (l).

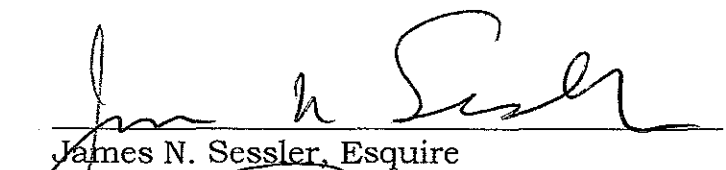
40. With respect to remorse, Mr. Sessler has expressed profound regret and a sincere apology for the negative impact his misconduct caused the McDonalds. Mr. Sessler has expressed remorse that his misconduct only served to exacerbate the suffering which the McDonalds had experienced as a result of the birthmother's change of heart.
41. None of the aforementioned factors are of such a nature to justify either an increase or decrease in the baseline sanction. A Reprimand is, therefore, the appropriate sanction in this matter.

IV. Stipulation as to Costs

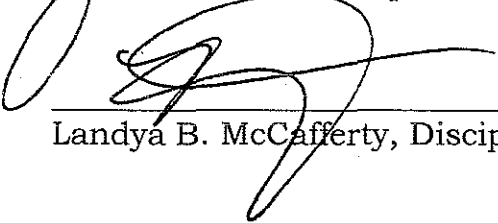
42. Mr. Sessler agrees to pay the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter.

Respectfully submitted

Dated: December 1, 2005


James N. Sessler, Esquire

Dated: December 5, 2005


Landya B. McCafferty, Disciplinary Counsel