

New Hampshire Supreme Court
Professional Conduct Committee

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Tierney, Nancy S. advs. Michael J. Mead #03-050

PUBLIC CENSURE

On January 17, 2006, the Professional Conduct Committee heard oral argument on the matter of Tierney, Nancy, S. advs. Michael Mead # 03-050. Members present were as follows: Margaret H. Nelson, Chair, Thomas P. Connair, Gerald A. Daley, Gretchen Rule Hamel, James R. Martin, David N. Page, Stephen B. Stepanek and Eleanor Wm. Dahar, Reporter. Benette Pizzimenti, Vice Chair, Toni Gray, Vice Chair, and David N. Cole were recused. Gerald A. Daley abstained. Landya B. McCafferty, Disciplinary Counsel, represented the Committee. Respondent Nancy S. Tierney was represented by Russell E. Hilliard, Esquire.

Factual Findings

On February 21, 2006, the Professional Conduct Committee, upon consideration and review, determined that the record supports the findings of fact by clear and convincing evidence as set forth in the Hearing Panel Report with respect to Rules 1.5(b), 1.15(b), 1.15(c) and 8.4(a):

1. Mr. and Mrs. Mead relied upon Nancy Tierney's assertion that her fees would be approximately \$400.00 (\$199.00 flat fee, plus approximately \$200.00 for a title search).
2. The Meads also relied on Ms. Tierney's assurance that she had experience handling real estate transactions.

3. Ms. Tierney failed to respond to both of Mr. Mead's requests to provide him with a letter outlining the scope of her representation.

4. Although real estate closings are often hectic and last minute, Ms. Tierney's lack of familiarity with the procedure and documents appeared to contribute to the confusion of the closing.

5. At the day of closing, Ms. Tierney's fees were substantially higher than she had originally quoted Mr. Mead \$865.00.

6. Ms. Tierney did not address at the closing Mr. Mead's concern regarding her fees. Rather, she stated that it could be corrected later.

7. Ms. Tierney later billed the Meads an additional \$155.88 for "extra costs and fees."

8. Ms. Tierney failed to pay the \$550.00 owed to the White Mountain Athletic Club, which was part of the condominium association fees. These funds had been paid to Ms. Tierney's trust account as part of the closing and were listed on the HUD Statement.

9. Although Ms. Tierney was aware that she was holding \$394.12 of the Mead's money, she did not return it to them - holding it for another two years.

10. Ms. Tierney refused to return Mr. Mead's phone calls, communicating instead via her paralegal or by sending letters.

11. Mr. Mead's sometimes rude and demanding behavior was likely a contributing factor to Ms. Tierney's unwillingness to communicate with Mr. Mead directly.

Rulings of Law

The Professional Conduct Committee, upon consideration and review, finds by clear and convincing evidence that Nancy Tierney violated Rule 1.5(b), 1.15(b), 1.15(c), 1.4, 1.16(d), and 8.4(a) of the N.H. Rules of Professional Conduct.

Rule 1.5(b): Communication About Fee

12. Ms. Tierney's failure to communicate or explain her fee structure to Mr. Mead, a client she had not previously represented, constitutes a violation of N.H. Rule of Professional Conduct 1.5(b).

13. Mr. Mead requested clarification of Ms. Tierney's fees on at least two occasions- neither of which prompted a response from Ms. Tierney.

14. Although it may not have been possible to precisely "predict" the final amount of the fee as requested by Mr. Mead, Ms. Tierney was obligated to provide her client with an explanation of her fee structure as requested by Mr. Mead. Her failure to do so constitutes a violation of N.H. Rule of Professional Conduct 1.5(b).

Rule 1.15(b): Safekeeping Property (Failure to Promptly Return Client Funds

15. Upon receipt of Mr. Mead's May 2003 letter to the Professional Conduct Committee, Ms. Tierney became aware that Mr. Mead paid the \$550.00 owed to the Athletic Club.

16. As of that date, Ms. Tierney was holding \$394.12 of Mr. Mead's money.

17. More than two years later, on July 26, 2005, Ms. Tierney still had not disbursed the money to Mr. Mead.

18. Ms. Tierney should have returned the disputed funds to Mr. Mead, and if she had desired, pursue the collection of her disputed remaining fees in another forum. She did not have a retainer agreement with Mr. Mead, nor was there any other agreement, written or otherwise, which justified her holding back this money in the context of a fee dispute.

19. Ms. Tierney's failure to promptly return Mr. Mead's money under the circumstances presented in this case and described above constitutes a violation of N.H. Rule of Professional Conduct 1.15(b).

Rule 1.15(c): Safekeeping Property (Disputed fees Not Kept Separate and Safeguarded)

20. As of this date of the real estate closing, Ms. Tierney was aware that Mr. Mead was disputing the attorney's fees.

21. Rather than maintaining the disputed amount in a separate account until the dispute could be resolved, Ms. Tierney disbursed to herself the amount of attorney's fees listed on the HUD Statement.

22. The Attorney's fees were also disbursed prior to paying all of the closing costs listed on the HUD Statement.

23. Ms. Tierney is in violation of N.H. Rule of Professional Conduct 1.15(C).

Rule 1.4: Client Communication

24. Ms. Tierney communicated with Mr. Mead in writing, through letters sent by Ms. Tierney or her paralegal.

25. Ms. Tierney failed to respond to Mr. Mead's requests for return telephone calls.

26. Ms. Tierney's actions described above constitute a violation of N.H. Rule of Professional Conduct 1.4.

Rule 1.16(d): Failure to Promptly Return Client Funds

27. This Rule states that “upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as.... refunding any advance payment of fee that has not been earned...”

28. Based on the failure of Ms. Tierney to return the disputed funds to the client, the Professional Conduct Committee concludes that Ms. Tierney’s actions constitute a violation of N.H. Rule of Professional Conduct 1.16(d).

Rule 8.4(a): General Rule

29. Because there exists clear and convincing evidence that Ms. Tierney violated the above rules, there is necessarily clear and convincing evidence of a violation of N.H. Rule of Professional Conduct 8.4(a).

Sanction

The Professional Conduct Committee determines that the appropriate discipline in this matter is a Public Censure. 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 or 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).

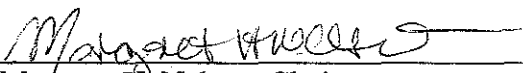
The Professional Conduct Committee orders Ms. Tierney to reimburse the committee for all expenses related to the investigation and prosecution of this matter.

Conclusion

For the above reasons, the Professional Conduct Committee issues a Public Censure to Nancy S. Tierney, for violating N.H. Rules of Professional Conduct 1.5, 1.15(b), 1.15(c), 1.4, 1.16(d), and 8.4(a).

Ms. Tierney is ordered to reimburse the committee for all expenses related to the investigation and prosecution of this matter.

May 26, 2006


Margaret H. Nelson, Chair