

New Hampshire Supreme Court  
**Professional Conduct Committee**

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Benette Pizzimenti, Vice Chair  
Toni M. Gray,\* Vice Chair  
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*Van De Water, Marc L. advs. Richard A. Withey # 06-015*

**REPRIMAND**

On July 17, 2007, the Professional Conduct Committee deliberated the above-captioned matter. Members present included: Margaret H. Nelson, Chair, Toni Gray, Vice Chair, Richard H Darling, Gerald A. Daley, Thomas P. Connair. Ellen L. Arnold and David N. Cole participated by telephone. Benette Pizzimenti, Vice Chair; James R. Martin, and David N. Page were absent. Oral Argument was not requested.

The Committee granted Disciplinary Counsel's Motion to Permit Waiver of Hearings Committee Process.

**I. FINDINGS OF FACT**

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

1. Mr. Van De Water is an attorney licensed to practice law in New Hampshire. Mr. Van De Water was admitted to practice in 1988. At all times material to this proceeding, Mr. Van De Water operated his law office as Van De Water Law Offices, P.L.L.C., 44 Albin Road, Bow, New Hampshire, 03304.
2. In June 2004, Richard A. Withey, the Complainant in this matter, was involved in an automobile accident caused by a drunk driver in Lawrence, Massachusetts.
3. In July 2004, Mr. Withey hired Mr. Van De Water to represent him. At that time, Mr. Withey signed a fee agreement, filled out medical release forms and gave Mr. Van De Water all of the information he had about the accident.
4. Approximately every 4-6 weeks thereafter, Mr. Withey contacted Mr. Van De Water to obtain a status update on his case. During these status updates, Mr. Van De Water explained to Mr. Withey that his case would be addressed "shortly."

5. During a status update in March 2005, Mr. Van De Water told Mr. Withey that his case would be handled in approximately "4-6 weeks."
6. In a conversation in April 2005, Mr. Van De Water apologized to Mr. Withey and stated that he would "dust off the file."
7. In July 2005, Mr. Withey telephoned again. This time, Mr. Van De Water requested that Mr. Withey sign new medical release forms. Mr. Withey signed the new forms.
8. In November 2005, Mr. Withey had difficulty reaching Mr. Van De Water by telephone. As a result, on December 1, 2005, Mr. Withey sent Mr. Van De Water the following email communication:

Mark,

I have been trying to reach you for the past three weeks. I have left five messages and have not heard back from you. I realize that you are very busy and most likely with cases that are more important with larger clients than I am, however this case is important to me.

The first time I needed you for help with my ex-wife you impressed me by telling me up front that if I was looking to torpedo her that you were not the person for the job. You did a great job helping me protect my children and I will always be grateful. It has been over a year since I came to you with my accident, and I realize I'm not paralyzed or disfigured but I would like to move forward.

Back in March you said it would be about 4 to six weeks more. Around May you told me you would "dust off the file" and back a few months ago I came in and signed release forms again because the originals were too old and now I can't even find out if we have even had a phone conversation with the insurance company.

There is nobody I would rather have represent me more than you, but if this is something you either do not have time for or are not interested in could you please just let me know and possibly refer me to someone so I can resolve this.

9. In an email dated December 5, 2005, Mr. Van De Water replied:

Dear Rick

Sorry for the troubles getting a hold of me. While moving the office to Bow I shattered my nose taking a 50 lb ladder swing from the 2<sup>nd</sup> floor ceiling of the barn, requiring a whole lot of doctor appointments and plastic surgery. This has erased the past month from my work schedule and I am just digging out. I look forward to helping you to resolve the matter, and I will be able to check into your matter on Tuesday.

Please make a note of my new cell 556-2277 (Verizon doesn't work in Bow, so we switched to Nextel). As always, that or e-mail is best way to raise me.

Thanks for your patience.

Marc

10. Having not heard anything from Mr. Van De Water, on January 16, 2006, Mr. Withey wrote the following in an email to Mr. Van De Water:

Marc,

It has been six weeks since we last communicated about my case. I sent an e-mail over a week ago and have not received a reply. Please update me on the following:

- 1) Who have you spoken to at the insurance company and when?
- 2) Has there been any correspondence with the insurance company?
- 3) What is the status of my medical records being sent out?
- 4) If we have had contact with the insurance company where do they stand on closing the case?

If the insurance company is dragging their feet then I want to file a lawsuit immediately because I have no intention of putting up with their nonsense for long.

Please let me know,  
Thanks, Rick Withey

11. Mr. Withey received no response to his January 16, 2006, email from Mr. Van De Water.
12. On January 24, 2006, Mr. Withey retained Ralph A. Barbagallo, Jr., of Barbagallo Law Office in Salem, New Hampshire to represent him.
13. Mr. Barbagallo sent two written requests, one on January 26 and the other on February 16, 2006, to Mr. Van De Water to release Mr. Withey's file.
14. As of March 13, 2006, Mr. Van De Water had not forwarded the file or otherwise responded to these letters.
15. On March 13, 2006, Mr. Withey sent a letter to the Attorney Discipline Office complaining about Mr. Van De Water's failures to communicate.
16. On or about May 4, 2006, Mr. Van De Water forwarded the file to Mr. Barbagallo. Mr. Withey ultimately decided not to pursue his case against the drunk driver.
17. In a letter to the Attorney Discipline Office dated May 4, 2006, Mr. Van De Water answered Mr. Withey's complaint.

## **II. RULINGS OF LAW**

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

### **Rule 1.3(a): Diligence**

18. Allegations set forth above are incorporated by reference.
19. From July 2004 through January 2006, while Mr. Van De Water was representing Mr. Withey, Mr. Van De Water took no action on Mr. Withey's behalf.
20. Mr. Van De Water's failure to take any legal action on Mr. Withey's behalf during this time-frame constitutes a lack of diligence. Mr. Van De Water's failure to act with diligence on Mr. Withey's behalf caused avoidable harm to their lawyer-client relationship.

### **Rule 1.16(d): Failure to Return File**

21. Allegations set forth above are incorporated by reference.
22. In two separate letters, one dated January 26 and the other dated February 16, 2006, Mr. Barbagallo requested that Mr. Van De Water release Mr. Withey's file to him.

23. Mr. Van De Water did not respond to those letters until May 4, 2006, after Mr. Withey filed his March 13, 2006, professional conduct complaint against Mr. Van De Water.
24. Mr. Van De Water knowingly failed to return Mr. Withey's file in a timely manner following Mr. Barbagallo's January 26<sup>th</sup> letter.
25. There is clear and convincing evidence that Mr. Van De Water's conduct in this regard constitutes a violation of N.H. R. Prof. Conduct 1.16(d).

**Rule 8.4(a): Misconduct**

26. Because there exists clear and convincing evidence that Mr. Van De Water 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 Committee hereby issues a Reprimand, as stipulated by the parties. A Reprimand serves the purposes of attorney discipline, see Coffey's Case, 152 N.H. 503, 513 (2005), and is consistent the American Bar Association's Standards for Imposing Lawyer Sanctions (1992).

Mr. Van De Water's misconduct involved a failure to act diligently for his client as well as a failure to promptly return the client's file. The Committee considered the following mitigating factors: Mr. Van De Water admitted his misconduct; accepted responsibility, expressed remorse, and has no prior disciplinary record.

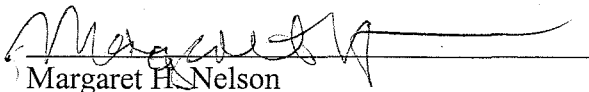
**IV. COSTS**

Mr. Van De Water 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 Reprimand to Marc L. Van De Water for the violations of N.H. R. Prof. Conduct 1.3(a), 1.16(d) and 8.4(a).

July 25, 2007

  
Margaret H. Nelson  
Chair

Distribution:

Landya B. McCafferty, Disciplinary Counsel  
Marc L. Van De Water, Esquire  
File