New Hampshire Supreme Court

Professional Conduct Committee

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Vanacore, John G. advs. Jessica Merchant # 04-077

REPRIMAND

This matter arose from a complaint filed by Ms. Jessica Merchant of Franklin, New Hampshire. Prior to a hearing, Mr. Vanacore and Assistant Disciplinary Counsel executed a stipulation as to facts, rules, costs, and sanction. The Professional Conduct Committee ("Committee") heard oral argument on February 20, 2007, and deliberated later in the same meeting. Members present included Margaret Nelson, Chair, Benette Pizzimenti, Vice Chair, Alan J. Cronheim, Thomas P. Connair, Ellen L. Arnold (via telephone), David N. Cole (via telephone), Gerald A. Daley, Richard H. Darling, Gretchen Rule Hamel, Reporter, and David N. Page. Committee member Toni M. Gray was recused from the matter. James R. Martin was absent and did not vote.

Having heard from the parties and considered the record, 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. Respondent John G. Vanacore is a New Hampshire attorney who was licensed to practice law in October, 1983. At all times material to this proceeding, he has been practicing at the Vanacore Law Office, 19 Washington Street, Concord, New Hampshire.

2. Complainant is Ms. Jessica Merchant of Franklin, New Hampshire. Ms. Merchant and her three children were involved in an automobile accident on December 28, 2001. Her claims against Mr. Vanacore are set forth in a sworn letter of complaint dated May 27, 2004. They arose in connection with Mr. Vanacore's performance as counsel in pursuit of personal injury claims arising out of the automobile accident. Mr. Vanacore has responded to the complaint in his letter of October 20, 2004.

3. Ms. Merchant retained Mr. Vanacore to represent her and her minor children on February 15, 2002. On that date, Ms. Merchant executed contingency fee agreements providing for fees of 33-1/3% of any recovery on behalf of Ms. Merchant, plus costs advanced, and 25% of any recovery on behalf of the minor children, plus costs advanced. The fee agreement contained no provision for fees chargeable in the event of termination of Mr. Vanacore prior to settlement or for a lien on settlement proceeds to secure payment of such fees.

4. Mr. Vanacore proceeded in a timely fashion with the investigation and preparation of Ms. Merchant's claims, including the collection of medical records and communications with MetLife, the defendant's insurance carrier.

5. In September and October, 2002, Ms. Merchant received letters from the law firm of Welts, White and Fontaine ("the Welts firm") demanding payment of $2,795.43 due Franklin Hospital for medical services rendered to Ms. Merchant following the subject accident. She supplied copies of the letters to Mr. Vanacore, who, in turn, executed and sent a "letter of protection" to the Welts firm, indicating that the debt would be paid out of the settlement proceeds.

6. By letter of October 18, 2002, the Welts firm advised Mr. Vanacore that it required a letter of protection signed by Ms. Merchant. Mr. Vanacore conferred with his client on October 23, 2002, and sent her a letter on the same day asking her to sign a letter of protection. Ms. Merchant did not respond.

7. Following further communication from the Welts firm, Mr. Vanacore wrote to Ms. Merchant on April 9, 2003, enclosing a copy of the Welts firm's latest demand and requesting again that she sign a letter of protection. Ms. Merchant did not respond.

8. Mr. Vanacore's aforementioned correspondence to Ms. Merchant was addressed to her at P.O Box 10 in Franklin, instead of her proper address at P.O. Box 13. However, the letters were not returned by the post office to Mr. Vanacore, and, consistent with customary U.S. Postal Service policy in Franklin, the letters were probably placed in Ms. Merchant's box.

9. On April 25, 2003, Mr. Vanacore wrote to Ms. Jackie Keating, an adjuster at MetLife, demanding settlement on behalf of Ms. Merchant in the amount of $75,000. Mr.

Vanacore had previously discussed the demand amount and described the negotiation process with Ms. Merchant.

10. Shortly thereafter, Ms. Keating advised Mr. Vanacore of the $25,000/$50,000 policy limits applicable to the underlying claims. Mr. Vanacore informed Ms. Merchant of the consequent limitation in potential recovery for her and that the children's claims had very little settlement value. In the course of trying to explain to Ms. Merchant how the insurance policy applied to the various claims, Mr. Vanacore indicated that if he could obtain the $25,000 policy limits for Ms. Merchant, he might be able to waive his fee for additional recovery on behalf of the children.

11. Ms. Merchant was very disappointed with Mr. Vanacore and the information supplied by him regarding settlement of the various claims, and she had difficulty understanding how the insurance coverage applied to limit her potential recovery. Ms. Merchant questioned Mr. Vanacore's veracity in reporting facts about insurance coverage and his assessment of value of the claims. The information provided to Ms. Merchant relative to insurance coverage was accurate. Because Ms. Merchant expressed doubt as to the veracity of his statements relative to coverage, Mr. Vanacore obtained the services of Glenn G. Geiger, Jr., Esquire, who assured Ms. Merchant that Mr. Vanacore's advice was correct.

12. In light of the foregoing difficulty in communication regarding the insurance issue, the attorney-client relationship deteriorated. Ms. Merchant never authorized Mr. Vanacore to settle for the policy limits or for any other amount.

13. In July 2003, the Welts firm initiated suit in Merrimack County Superior Court against Ms. Merchant on behalf of Franklin Hospital. A July 21, 2003, return of service indicates abode service at 16 Glen Street in Franklin where Ms. Merchant claims she no longer resided. Ms. Merchant did not file an appearance or an answer, and default judgment was entered on October 30, 2003. Nor did Ms. Merchant respond to a Motion for Final Judgment, apparently served by mail to "Jessica Merchant, P.O. Box 13, 16 Glen Street, Franklin, NH 03235."

14. By letter of November 4, 2003, addressed to 16 Glen Street, P.O. Box 13 in Franklin, the Welts firm notified Ms. Merchant of the default judgment. According to Ms. Merchant, this was the first notice she received of any formal law suit filed in court. Mr. Vanacore had not previously been made aware of the suit. However, Ms. Merchant believed that Mr. Vanacore was responsible for allowing the judgment to be entered.

15. Following issuance of the aforesaid default judgment, and in light of the deterioration of the attorney-client relationship as described herein, Ms. Merchant terminated Mr. Vanacore. Consistent with Ms. Merchant's instructions, Mr. Vanacore withdrew as her counsel on November 20, 2003.

16. As of the date of termination, Mr. Vanacore had not entered an appearance or initiated any court action or administrative proceeding on behalf of Ms. Merchant or her children. Nor had he obtained a settlement offer from the carrier.

17. In his letter of withdrawal, Mr. Vanacore undertook to alert Ms. Merchant to various issues bearing on her claim and her obligation to deal with medical expenses. However, he made no reference to the question of attorney fees for services rendered and costs incurred to date on behalf of Ms. Merchant and her children.

18. Mr. Vanacore also turned over his file to Ms. Merchant on November 20, 2003. Included in the package was Mr. Vanacore's letter of same date to MetLife. With that letter, Mr. Vanacore attached itemized statements of charges for services rendered to Ms. Merchant and her children "to serve as liens on any eventual settlement or judgment in her cases."

19. At the time of termination, Ms. Merchant and Mr. Vanacore spoke about the issue of fees. While they apparently agreed that a fee would paid for the time invested by Mr. Vanacore, there was no discussion as to the amount or as to how the fee would be calculated. Nor was there any specific reference to Mr. Vanacore's aforementioned lien letter to the carrier or to any "liens."

20. At no time did Mr. Vanacore initiate any court process to secure payment of claims he might have for fees and costs incurred on behalf of Ms. Merchant and her children.

21. Ms. Merchant and Mr. Vanacore had never discussed fees other than those potentially recoverable (or that Mr. Vanacore might be willing to waive) under the contingent fee arrangement. Mr. Vanacore had not previously issued any bills to Ms. Merchant; nor had he discussed fees payable in the event he was not allowed to remain in the case until settlement was achieved.

22. Statements accompanying Mr. Vanacore's November 20, 2003, letter to the carrier (to "serve as liens....") included all charges and expenses logged in connection with Ms. Merchant's claim and her children's claims. Charges were calculated using Mr. Vanacore's customary hourly rate.

23. On or about January 13, 2004, Ms. Merchant, representing herself, agreed with MetLife to settle her claim for a total of $16,500. At some point, she also agreed to accept $1,200 each for two of her children. Ms. Merchant had not filed suit in connection with these matters.

24. In early February, 2004, Ms. Merchant spoke with Ms. Stephanie Sirois, another adjuster at MetLife, about payment of the settlement amounts. Ms. Sirois referred to Mr. Vanacore's asserted lien on settlement proceeds ($3,008.12 from Ms. Merchant's recovery). Ms. Merchant objected to the lien and told Ms. Sirois she wanted a judge to review the matter. Ms. Sirois advised that the carrier had no choice but to honor the

attorney lien and asked Ms. Merchant to choose whether she wanted the carrier to issue a separate check to Mr. Vanacore or to issue a single check payable to both Mr. Vanacore and Ms. Merchant. Ms. Merchant did not respond.

25. Neither Ms. Merchant nor anyone from MetLife notified Mr. Vanacore prior to closing on the settlement of any potential dispute over the lien claimed or fees charged.

26. Ms. Merchant executed a settlement agreement dated February 18, 2004, accepting $16,500 in full satisfaction of her personal injury claim. By letter dated February 19, 2004, Ms. Keating of MetLife advised Ms. Merchant that, with respect to her claim, two checks would be issued and tendered under separate cover—one to her for $13,491.88 and one to Mr. Vanacore for $3,008.12.

27. Ms. Merchant accepted the carrier's check dated February 20, 2004, in the amount of $13,491.88. Following further communication with Mr. Vanacore's paralegal, Deborah Noll, regarding the "liens", MetLife issued checks for the children's claims and separate checks to Mr. Vanacore dated February 27, 2004, for $305.26 and $303.07.

28. Mr. Vanacore accepted each of the aforementioned payments out of the settlement proceeds. The amounts were consistent with his time and expense records. Mr. Vanacore deposited all of the funds in his firm's operating account as payment for outstanding fees and costs attributable to Ms. Merchant and her children.

29. After receiving the aforementioned settlement checks, Ms. Merchant called Mr. Vanacore's office to discuss the liens and fees charged in connection with the claims. Ms. Merchant spoke briefly with Ms. Noll, complaining that Mr. Vanacore had taken money out of the children's settlements in spite of his promise not to do so. However, Ms. Merchant was highly emotional and confrontational and Ms. Noll hung up the phone. Ms. Merchant called back later and reiterated her complaint. Ms. Noll indicated that she would ask Mr. Vanacore to return Ms. Merchant's call. There was no subsequent communication, oral or written, between Mr. Vanacore and Ms. Merchant relative to the liens claimed or the fees charged in connection with the various claims.

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 Stipulation, as follows:

Rule 1.1: Competence

30. Mr. Vanacore owed a duty to perform competently in connection with any matter affecting the interests of his client.

31. Mr. Vanacore failed to apply or to obtain specific knowledge as to the proper way under New Hampshire law and court rules to perfect and pursue an attorney's lien on his client's settlement proceeds.

32. Pursuant to RSA 311:13, Mr. Vanacore was not entitled to assert charging liens for attorney's fees on proceeds of the settlements obtained in connection with Ms. Merchant's claim or the claims of her children.

33. Mr. Vanacore undertook to claim such attorney's liens contrary to applicable law.

34. Ms. Merchant did not assent to any charging or retaining liens asserted by Mr. Vanacore relative to the aforesaid proceeds of settlement.

35. There is clear and convincing evidence of the foregoing allegations which constitute a violation of N.H. R. Prof. C. 1.1(a) and (b)(1)(2).

Rule 1.4: Client Communications

36. Mr. Vanacore had a duty to keep his client reasonably informed regarding the status of the matter, including the effect his termination prior to settlement or trial would have on the question of fees.

37. Mr. Vanacore did not have an agreement with Ms. Merchant for the payment of fees in the absence of a settlement or verdict obtained by Mr. Vanacore in favor of Ms. Merchant and her children.

38. Prior to settling the personal injury claims, Mr. Vanacore was terminated by Ms. Merchant.

39. At the time of termination, Mr. Vanacore did not discuss with Ms. Merchant the terms under which fees would be calculated and paid for services rendered to date.

40. Following disbursement of settlement proceeds by the insurance carrier, net of fees claimed by Mr. Vanacore, Ms. Merchant contacted Mr. Vanacore's office to complain about fees charged in connection with her children's claims.

41. Mr. Vanacore neglected to contact Ms. Merchant or otherwise to respond to her inquiry.

42. There is clear and convincing evidence that the foregoing conduct constitutes a violation of N.H. R. Prof. C. 1.4.

Rule 8.4(a): Misconduct

43. Because there is clear and convincing evidence that Mr. Vanacore violated the above rules, there is necessarily clear and convincing evidence that he has violated N.H. R. Prof. Conduct 8.4(a).

III. SANCTION

The above facts and violations having been established, the Committee determined that the appropriate sanction is a reprimand.

New Hampshire law and the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) ("Standards") support the conclusion that Mr. Vanacore should receive a Reprimand in connection with the misconduct found in this matter. 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). "The sanction must take into account the severity of the misconduct." Id. Although the Court has not adopted the 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 steps 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. Id. ("After determining the sanction, [the Court] considers the effect of any aggravating or mitigating factors on the ultimate sanction.")

Under the first prong of the analysis, Mr. Vanacore's conduct may be fairly characterized as an "isolated instance of negligence," or failure to understand a legal procedure. The Standards contemplate an "admonition" or "reprimand" for such conduct.1 Standards, § §. 4.53 and 4.54.

To determine the baseline sanction, the Standards next require analysis of both Mr. Vanacore's state of mind and the injury or potential injury caused by his conduct. While Mr. Vanacore erred by asserting a lien in his correspondence with the insurance carrier, there is no evidence that Mr. Vanacore undertook deliberately to avoid or circumvent the appropriate process for securing recovery of his fees. Rather, he negligently failed to research and understand the law and he failed to effectively supervise his staff in pursuing recovery of his fee. Prior to termination, Mr. Vanacore had provided appropriate legal services to his client directed at maximizing her recovery for personal injury sustained in an automobile accident. While Ms. Merchant lost confidence in Mr. Vanacore and terminated him before he could settle the case and earn his contingent fee, there is no dispute that Mr. Vanacore was entitled to recover reasonable fees and expenses associated with services rendered to date.

In pursuing payment of such fees, Mr. Vanacore failed to recognize limitations in the law relative to pursuit of a lien to secure his claim. While he might have availed himself of the pre-judgment attachment process under RSA 511-A, he neglected to do so. See Committee Notes to Decisions, Rule 1.15. Mr. Vanacore was not otherwise entitled to perfect a lien under RSA 311:13 because the underlying personal injury claim was not the subject of a formal proceeding. Mr. Vanacore's error in the manner of pursuing a lien was compounded by the carrier's determination to issue separate checks to Mr. Vanacore, over Ms. Merchant's objection, and without service of a valid lien.

To the extent Ms. Merchant may have had a valid dispute regarding fees, Mr. Vanacore's assertion of a lien and his failure to communicate adequately with Ms. Merchant, placed Ms. Merchant at some risk of potential loss. However, Ms. Merchant did not make clear to Mr.

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1 The New Hampshire equivalent of an "admonition" under the Standards is a Reprimand, and a "reprimand" under

Vanacore that she disputed his fee until after the insurance checks had been disbursed and deposited. Moreover, she has articulated two basic complaints relative to fees that appear to be without merit. Ms. Merchant would claim an offset to Mr. Vanacore's fees based on the default judgment obtained by Franklin Hospital for which she believes Mr. Vanacore is responsible. Ms. Merchant would also contest fees charged in the children's cases on grounds that Mr. Vanacore agreed not to charge for their recovery. Neither of Ms. Merchant's claims in this regard appears to be supported by the evidence, as summarized herein. There do not appear to be any irregularities or excesses in the statements of charges issued by Mr. Vanacore in connection with the underlying cases.

The final step in the analysis is to determine if there are any aggravating and/or mitigating factors that affect the baseline sanction. Mitigating factors include the following: Mr. Vanacore has acknowledged his mistake with regard to the lien and with regard to client communications. He has been fully candid and cooperative in the investigation of this complaint. An aggravating factor is Mr. Vanacore's substantial experience in the practice of law. Further, while not directly related to the conduct in the present case, a prior complaint filed against Mr. Vanacore was dismissed in 2000 with a warning that he should "respond to client requests for information from their files in a timely manner."

The aggravating and mitigating factors do not appear to warrant a change in the recommended baseline sanction. Taking into consideration the multi-part analysis recommended by the Standards, as well as the purposes of attorney discipline in New Hampshire, the appropriate sanction in this matter is a Reprimand.

IV. COSTS

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

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the Standards is a Public Censure under New Hampshire law.

V. CONCLUSION

Based on the above, the Professional Conduct Committee issues this Reprimand to John G. Vanacore for the violations of the Rules of Professional Conduct cited above.

May 1, 2007

Margaret H. Nelson
Chair

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