

New Hampshire Supreme Court

Professional Conduct Committee

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Reprimand

On February 21, 2006, the Professional Conduct Committee heard a Motion to Permit Waiver of Hearings Committee Process. The motion was made by Landya B. McCafferty, Disciplinary Counsel. Members present were as follows: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Eleanor Wm. Dahar, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Gretchen Rule Hamel, James R. Martin, David N. Page and Stephen B. Stepanek, Reporter. Toni Gray, Vice Chair was recused. Disciplinary Counsel, Landya B. McCafferty and Respondent, Richard J. Walsh, represented by Russell F. Hilliard, Esquire, submitted a Stipulation in the matter. The Committee, upon review, hereby grants the Motion, and accepts the Stipulation of the parties.

Stipulation of Facts

1. Mr. Walsh is an attorney licensed to practice law in New Hampshire. Mr. Walsh was admitted to practice in 1976. At all times material to this proceeding, through January 2005, Mr. Walsh practiced at the firm of McDowell and Osburn, PA, 282 River Road, P.O. Box 3360, Manchester, New Hampshire 03105. Mr. Walsh currently practices at his own law office as Attorney at Law, 212 Coolidge Street, Manchester, New Hampshire 03102.
2. Mr. Walsh represented Mark C. and Lori S. Swanson in a lawsuit against various defendants for personal injuries suffered by Mr. Swanson on October 24, 1998, as a result of a serious car accident in Milton, New Hampshire.

3. At the time of the accident, Mr. Swanson was a passenger in his own vehicle, which was being driven by a friend, Kevin Clancy. Following the accident, Mr. Clancy was arrested, charged, and convicted for felony-level Aggravated DWI.
4. As a result of the accident, Mr. Swanson suffered severe injuries including traumatic brain injury.
5. The Swansons were referred to Mr. Walsh by Michael F. Natola, Esq., Ms. Swanson's brother. Mr. Natola is licensed in Massachusetts.
6. On November 12, 1999, Mr. Walsh met with the Swansons for the first time at the home of Mr. Natola.
7. On October 18, 2001, Mr. Walsh filed a lawsuit on behalf of the Swansons in Strafford County Superior Court (docket #01-C-295).
8. The central defendants in the lawsuit were Frank Spinale, Jr. and the restaurant, Lucky Seven, Inc. d/b/a Spinale's Italian Restaurant. With respect to Mr. Spinale, the lawsuit alleged a "social host" theory of liability. With respect to the restaurant, the lawsuit alleged "reckless service."
9. Mr. Spinale was represented by William A. Mulvey, Jr., Esq. The restaurant was represented by Kevin C. Devine, Esq.
10. On April 10, 2002, the defendants took Mr. and Ms. Swanson's depositions.
11. In his deposition, Mr. Swanson admitted that he had consumed only "one beer plus" while at the restaurant, and that he had brought alcohol and cocaine to the "party" which took place thereafter at Mr. Spinale's residence.
12. Largely based on Mr. Swanson's deposition testimony, the defendants filed motions for summary judgment on July 18 and October 9, 2002.
13. On October 15 and November 21, 2002, Mr. Walsh filed objections to both motions.
14. On March 17, 2003, Mr. Walsh appeared on behalf of the Swansons for oral argument on the motions for summary judgment before Honorable Bruce E. Mohl.
15. By Order dated April 4, 2003, Judge Mohl granted both motions for summary judgment.
16. Mr. Walsh waited approximately nine months before communicating to the Swansons the fact that Judge Mohl had granted the defendants' motions for summary judgment.

17. In the meantime, Mr. Walsh took no independent action to preserve the Swanson's right to appeal Judge Mohl's Order.
18. The Swansons ultimately learned of Judge Mohl's Order from Mr. Natola, not Mr. Walsh. On or about January 6, 2004, Mr. Walsh telefaxed a letter to Mr. Natola dated January 6, 2004:

This letter is in response to your recent telephone message, subject as above.

I am sorry to advise that the Swanson case is over, having been the subject of successful Motions for Summary Judgment on the part of the several defendants in the Strafford County Superior Court. Details will follow in a letter sent under separate cover.

I am sorry that these cases turned out this way, because I had put in a great deal of time and effort with respect to same over a period of several years. I know we both realized when I was asked to be involved in these cases that establishing liability for Mark Swanson's injuries on parties other than Kevin Clancy was going to be extremely difficult, and by no means a sure thing. Ultimately, we could not overcome the facts and circumstances which were presented in the case in terms of establishing the necessary requirement of recklessness on the part of Mr. Spinale and/or Lucky Seven, Inc. d/b/a Spinale's Italian Restaurant.

I certainly wish Mark, Lori, and you the best for the future, and wish that things could have turned out differently.

19. Between the date of Judge Mohl's April 4, 2003, Order and Mr. Walsh's January 6, 2004, letter, Ms. Swanson telephoned Mr. Walsh on numerous occasions seeking an update on the case. Mr. Walsh did not return any of Ms. Swanson's telephone calls.
20. After Ms. Swanson learned of Mr. Walsh's January 6, 2004, letter to her brother, Ms. Swanson made numerous telephone calls to Mr. Walsh seeking explanation. Mr. Walsh did not return any of these telephone calls.

Stipulation as to Rules Violated

21. Following Judge Mohl's April 4, 2003, Order, Mr. Walsh failed to notify the Swansons of the Order until on or about January 6, 2004. This was well after the time-limit for filing an appeal of the Order had expired.
22. By failing to notify the Swansons of the Order until after the expiration of the appeal period, Mr. Walsh caused the Swansons to lose their right to appeal the Order.
23. Mr. Walsh also failed to respond to Ms. Swanson's repeated telephone calls during two critical time frames: between the date of the Order and the January 6, 2004, letter; and after the Swansons received notice of Mr. Walsh's January 6, 2004, letter.
24. Mr. Walsh's failures in these regards, if proven by clear and convincing evidence, would constitute a violation of N.H. R. Prof. Conduct 1.4(a), (b) and (c).
25. Because there exists clear and convincing evidence that Mr. Walsh violated the above rules, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

Stipulation as to Sanction

26. Disciplinary Counsel and Mr. Walsh jointly recommend a Reprimand as the appropriate sanction in this matter. A Reprimand would serve the purposes of attorney discipline.
27. 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).

28. “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).
29. 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, No. LD-2005-002, slip op. at 2.
30. 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, No. LD-2005-002, slip op. at 2 (quoting Standards § 3.0).
31. “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, No. LD-2005-002, slip op. at 2.
32. Section 4.4 of the Standards generally addresses appropriate sanctions to be imposed when a lawyer violates his duty to act with due diligence for his clients. According to section 4.43, Public Censure “is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.” Standards § 4.43. According to section 4.44, however, a Reprimand “is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual injury or potential injury to a client.” Standards § 4.44.
33. The actual injury to the clients is difficult to assess in this case, as it is impossible to know whether Mr. Walsh’s clients would have elected an appeal and, if so, whether Mr.

- Walsh's legal arguments would have succeeded on appeal. A strong argument can be made, however, that the likelihood of success on appeal in the underlying matter was low.
34. The difficulty in assessing injury in this matter is due entirely to Mr. Walsh's misconduct.
 35. Further, there can be no doubt that Mr. Walsh's misconduct caused his clients to suffer needless anxiety and stress, and to lose faith in the legal system.
 36. The appropriate baseline sanction in this matter appears to fall somewhere between a Public Censure and a Reprimand.
 37. In light of the mitigating and aggravating factors present in this case, however, a Reprimand appears to be the more appropriate sanction.
 38. Section 9.32 contains a non-exhaustive list of potential mitigating factors. Three apply here. First, Mr. Walsh acted without selfish or dishonest motive. Standards § 9.32(b). Second, Mr. Walsh has accepted full responsibility and been fully cooperative with the disciplinary system. Standards § 9.32(e). Third, Mr. Walsh has expressed remorse for his misconduct. Standards § 9.32(l).
 39. Section 9.22 contains a non-exhaustive list of potential aggravating factors. Only one is applicable here. Mr. Walsh has a prior Warning for conduct that is similar in nature to his misconduct here. (A copy of Mr. Walsh's prior Warning is attached hereto as Exhibit 1.)
 40. While the prior Warning is a proper aggravating factor to consider, it does not warrant increasing the baseline sanction to Public Censure in light of the fact that Mr. Walsh received the Warning more than one year after he committed the misconduct at issue here.
 41. For these reasons, Disciplinary Counsel and Mr. Walsh jointly recommend a Reprimand as the appropriate sanction for misconduct in this matter.

Stipulation as to Costs

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

Conclusion

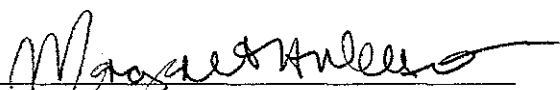
The Committee discussed the Stipulation agreement on case # 04-007. Upon a motion made and

duly seconded, and following further discussion it was then voted to Grant the Motion to Permit Waiver of Hearings Committee Process and Stipulation. Mr. Walsh violated the following Rules of Professional Conduct: 1.4(a), 1.4(b), 1.4(c) and 8.4(a). The Committee hereby orders this Reprimand. Mr. Walsh is hereby ordered to pay the Professional Conduct Committee for the costs associated with the investigation and prosecution of this matter.

Right to Appeal

Pursuant to Supreme Court Rule 37(3)(c) last paragraph, Richard Walsh has the right to appeal to the New Hampshire Supreme Court. See also Supreme Court Rule 37(A)(III)(d)(4).

April 20, 2006


Margaret H. Nelson, Chair

Distribution:

Landy B. McCafferty, Disciplinary Counsel
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File