

## New Hampshire Supreme Court

### Professional Conduct Committee

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Toni M. Gray,\* Vice Chair  
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*Clark, Grenville III advs. Lisa M. Cassidy # 05-111*

### PUBLIC CENSURE WITH CONDITIONS

This matter arose from a complaint filed by Ms. Lisa M. Cassidy against Grenville Clark III. Prior to a hearing, Mr. Clark and Disciplinary Counsel executed a stipulation as to facts, rules, costs, and sanction. The Professional Conduct Committee ("Committee") first considered this matter on September 18, 2007, but deferred final deliberations pending an update from Mr. Clark regarding whether he had met the conditions specified in a prior matter, *Clark, Grenville III advs. Epaminondas Tingas # 03-062*. Due to Mr. Clark's failure to respond to a written inquiry, the Committee scheduled (and heard) oral argument on November 20, 2007, and deliberated later in the same meeting.

For the initial deliberations, Margaret H. Nelson, Committee Chair, presided; Committee member David N. Page was recused from the matter; Committee members Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Thomas P. Connair, Alan J. Cronheim, Richard H. Darling, James R. Martin, Gretchen Rule Hamel, and James J. Tenn, Jr., were present; Committee member David N. Cole participated by telephone; and Committee member Gerald A. Daley was absent and did not participate in the discussion or vote. For the oral argument and final deliberations, Benette Pizzimenti, Committee Vice Chair, presided; Committee members David N. Page and Gerald A. Daley were recused from the matter; Committee members Toni M. Gray, Vice Chair, Thomas P.

Connair, Alan J. Cronheim, Richard H. Darling, James R. Martin, Gretchen Rule Hamel, and James J. Tenn, Jr. were present; and Committee members Margaret H. Nelson and David N. Cole were absent and did not participate in the discussion or 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. Mr. Clark is an attorney licensed to practice law in New Hampshire. Mr. Clark was admitted to practice in 1971. At all times material to this proceeding, Mr. Clark operated his law office as Gray, Wendell & Clark, P.C., 650 Elm Street, Manchester, New Hampshire 03101.
2. Lisa M. Cassidy, the Complainant in this matter, hired Mr. Clark to provide legal representation and advice with respect to a student loan obligation.
3. Ms. Cassidy first contacted Mr. Clark's office by telephone on May 15, 2002 about her student loan obligation. She first met with Mr. Clark at his office in November 2002 to discuss her financial situation, and in particular, her option for dealing with her student loan obligation. One of the options discussed was to obtain a discharge of her loan obligation through bankruptcy. At that time, she had not decided on whether she wanted to seek a discharge of the obligation in bankruptcy.
4. On January 13, 2004, Ms. Cassidy met with Mr. Clark and paid him a retainer of \$750.00.
5. At some point thereafter, Ms. Cassidy apparently came to believe that Mr. Clark was going to assist her in getting the student loan obligation discharged through bankruptcy.
6. Over time, Ms. Cassidy became dissatisfied with what she viewed as Mr. Clark's failures

both to communicate with her, and to take action on her behalf.

7. In a letter to Mr. Clark dated October 25, 2005, which Ms. Cassidy sent via certified mail, return receipt requested, Ms. Cassidy expressed her dissatisfaction with Mr. Clark and demanded that he return her “retainer of \$750 within 2 weeks.”
8. Ms. Cassidy received the return receipt documenting that Mr. Clark had received her letter of October 25, 2005.
9. Ms. Cassidy telephoned Mr. Clark’s office and Mr. Clark’s secretary confirmed that Mr. Clark had received her letter and would get in touch with her.
10. As of December 23, 2005, Ms. Cassidy still had heard no response from Mr. Clark.
11. In a letter to the Attorney Discipline Office dated December 23, 2005, Ms. Cassidy complained about Mr. Clark’s failures to respond to her October 25, 2005, letter and to return her money.
12. In a letter to Mr. Clark dated December 27, 2005, James L. DeHart, General Counsel of the Attorney Discipline Office, informed Mr. Clark that the Attorney Discipline Office was docketing a complaint against him on the basis of Ms. Cassidy’s grievance.
13. In a letter to Mr. DeHart dated February 2, 2006, Mr. Clark responded to Ms. Cassidy’s complaint.
14. On that same date, Mr. Clark wrote a \$750.00 check to Ms. Cassidy.
15. Mr. Clark contended that he could have billed Ms. Cassidy for \$490.00 worth of legal work, but, instead, he returned her entire retainer.

## II. RULINGS OF LAW

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

### **Rule 1.15(b): Failure to Return Funds Promptly**

16. Allegations set forth above are incorporated by reference.
17. As of his receipt of Ms. Cassidy's October 25, 2005, letter, Mr. Clark was aware that Ms. Cassidy was requesting the return of her \$750.00 retainer. In her letter, Ms. Cassidy requested that Mr. Clark return the funds "within 2 weeks."
18. Mr. Clark did not respond to Ms. Cassidy's letter until after she filed a professional conduct complaint against him. Mr. Clark refunded her money on or about February 2, 2006.
19. Mr. Clark held Ms. Cassidy's funds without justification for approximately three months.
20. Even if Mr. Clark was arguably entitled to \$490.00 of Ms. Cassidy's retainer, Mr. Clark was still holding \$260.00 of Ms. Cassidy's funds without any justification.
21. Mr. Clark's conduct in holding any amount of Ms. Cassidy's funds for three months without any justification constitutes a knowing failure to promptly deliver to Ms. Cassidy funds which she was entitled to receive.
22. Mr. Clark's conduct in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.15(b).

### **Rule 8.4(a): General Rule**

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

### III. DISCUSSION OF APPROPRIATE SANCTION

Disciplinary Counsel and Mr. Clark jointly recommended a Public Censure, with one condition, as the appropriate sanction in this matter. Specifically, Mr. Clark would take and pass the Multi-State Professional Responsibility Exam (MPRE), and show proof to Disciplinary Counsel of same, on or before a date specified by the Committee, on condition that if Mr. Clark does not fulfill this condition, he would be suspended from the practice of law for six months.

Both case law in New Hampshire and the American Bar Association's Standards for Imposing Lawyer Sanctions (1992) ("Standards") support the conclusion that Mr. Clark should be publicly censured. 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. See 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. Clark violated his duty to his client to return promptly all funds belonging to her. The section of the Standards that deals with a lawyer’s mishandling of client funds is §4.11, entitled “Failure to Preserve the Client’s Property.” That section indicates that “[d]isbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.” Standards § 4.11. This standard is clearly not applicable here.

A suspension is recommended where “a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.” Standards §4.12. The commentary to this section indicates that failing to promptly return funds to a client constitutes “dealing improperly with client money.” See Standards §4.12 (Commentary) “Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common involve lawyers who commingle client funds with their own, or fail to remit client funds promptly.” A Public Censure<sup>1</sup> is recommended a “when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.” Standards §4.13. A Reprimand is recommended “when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.” Standards §4.14.

Negligence properly characterizes the behavior of an attorney who, under circumstances such as those presented here, fails to remit client funds within a three-month time-frame. Because Mr. Clark retained Ms. Cassidy’s funds for a short time-period, the actual injury Ms. Cassidy

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<sup>1</sup> Section 4.13: Reprimand [construed as Public Censure under N.H. Sup. Ct. R. 37(2)(g)] is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. Section 4:14: Admonition [construed as Reprimand under N.H. Sup. Ct. R. 37(2)(i)] is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

suffered was minimized. It appears, therefore, that under the first prong of the test, Mr. Clark's baseline sanction falls between a Reprimand and a Public Censure.

The Standards next require analysis of Mr. Clark's state of mind. In this regard, the evidence is clear that as of Ms. Cassidy's October 25, 2005, letter, Mr. Clark knowingly retained funds belonging to Ms. Cassidy.

The third prong of the analysis requires consideration of the potential or actual injury caused by Mr. Clark's misconduct. Here, Ms. Cassidy was injured because Mr. Clark deprived her for three months of access to money that was rightfully hers. There also is harm to the reputation of the bar whenever an attorney is not fastidious in his or her ethical obligations toward client funds.

The final step in the analysis is to determine whether there are any aggravating and/or mitigating factors that affect the baseline sanction.

There are two aggravating factors in this case. The more significant aggravating factor is Mr. Clark's prior disciplinary history. See Standards §9.22(a). Mr. Clark has three prior Reprimands and two Public Censures on his record. With the exception of a 2003 Public Censure, however, Mr. Clark's prior history is over 12 years old. While Mr. Clark does not have a record of having ever violated Rule 1.15, he does have a history of failing to communicate and act diligently. In addition, Mr. Clark has significant experience in the law (36 years), another aggravating factor to be considered in considering an increase in the baseline sanction. See Standards §9.22(i).

The mitigating factors in this case are the absence of a dishonest or selfish motive, Standards §9.32(b), and a full and free disclosure to the disciplinary board and cooperative attitude toward proceedings. Standards §§9.32(e).

#### IV. SANCTION

The Committee appreciates Mr. Clark's cooperation in this matter. However, the Committee is troubled by his failure to respond to the Committee's written inquiry regarding the status of his obligations under the 2003 Public Censure, which directly caused additional resources to be expended on this matter. As a result, the Committee has concluded that in addition to taking the Multi-state Professional Responsibility Exam (MPRE), Mr. Clark should obtain assistance in office management, with an emphasis on communications.

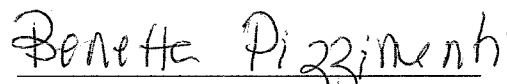
The Committee thus hereby issues a Public Censure, with the following conditions:

(1) Mr. Clark shall take the MPRE within one year of the date of this decision and report the results to the Attorney Discipline Office (ADO). If Mr. Clark is unable to pass the examination, the matter shall be referred back to the Committee for further proceedings;

(2) Subject to the approval and oversight of the ADO, Mr. Clark shall hire, within 45 days of this order and at his own expense, a consultant in law office management to (a) evaluate Mr. Clark's law office practices, including calendaring; (b) make recommendations, within 90 days of this order, for improvements to Mr. Clark's office practices, with a schedule on which the recommended improvements are to be implemented; and (c) to report on Mr. Clark's progress to the ADO on a quarterly basis for one year from the date of the recommendations, and

(3) Mr. Clark shall pay the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter.

January 31, 2008

  
Benette Pizzimenti, Vice Chair

Distribution:

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