

New Hampshire Supreme Court
Professional Conduct Committee

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Engel, David C. advs. Barbara Hill #02-039

Reprimand and Six Live Ethical CLE Credits

On July 19, 2005, the Professional Conduct Committee deliberated the above-referenced matter. Members present included: Margaret H. Nelson, Chair; Benette Pizzimenti, Vice Chair; Stephen Stepanek, Reporter; Nancy Hacking; Gretchen Rule Hamel and David Page. James Martin, David Cole and Richard McNamara did not participate.

The Professional Conduct Committee thoroughly reviewed the Record in this matter, including:

- Notice of Charges
- Proposed Findings of Fact, Rulings of Law and Recommended Sanction
- Notice of Hearing
- Report of Pre-hearing Conference
- Transcript of May 3, 2005 Hearing
- Motion to Reopen Record for Limited Purpose of Submitting Complainant's May 1, 2005, Letter as Exhibit
- Hearing Panel Report

Oral argument was not requested. Having reviewed the Record listed above, the Professional Conduct Committee made the following factual findings as detailed below:

Factual Findings:

The Professional Conduct Committee has determined that the Record supports the following factual findings of the hearing panel by clear and convincing evidence:

1. On October 28, 1997, Mr. Engel represented Roy C. White. On that date, Mr. White signed his "Last Will and Testament," which Mr. Engel had drafted for him. In his Will, Mr. White appointed Mr. Engel as executor.
2. On June 1, 2000, Mr. White died.
3. On June 9, 2000, Mr. Engel met with seven of Mr. White's eight surviving children, including the complainant, Barbara A. Hill.

4. On June 28, 2000, the Rockingham County Probate Court granted Mr. Engel's Petition for Estate Administration, thereby appointing Mr. Engel as executor of Mr. White's Estate.
5. Throughout the pendency of Mr. White's probate matter, Mr. Engel served as both fiduciary and counsel to the fiduciary. In Mr. Engel's capacity as counsel to the fiduciary, Mr. Engel's "client" for purposes of this Notice of Charges was technically, Mr. Engel, as the personal representative of the Estate. In a more practical sense, however, Mr. Engel's "client" for purposes of this Notice of Charges was the Estate.
6. According to Mr. Engel's records, on or about February 12, 2001, Mr. Engel opened the "Estate of Roy L. White" bank account at the Bank of New Hampshire ("Estate Account"). The Estate Account was a checking account identified by the following account number: 924-0196439.
7. On July 10, 2001, Mr. Engel filed the Final Accounting for the Estate. On September 10, 2001, Judge Cassevechia approved the Final Accounting.
8. Within thirty days after Mr. Engel filed the Final Accounting, Mr. Engel should have disbursed all remaining funds to which the beneficiaries were entitled.
9. In a letter of complaint to the Professional Conduct Committee dated January 2, 2002, Ms. Hill asserted allegations of professional misconduct against Mr. Engel.
10. In paragraph fourteen of Ms. Hill's letter, she wrote:

What happens to the \$1444.85 in the bank account now. Our share of the proceeds have been distributed and this amount remains. There is a \$15.00 a month charge being imposed on this account. This account, if it's necessary to maintain, should be converted to another type of account to avoid this fee.
11. According to the Estate Account bank statements, Ms. Hill was correct. The Estate Account was still open as of the date of her letter, and it contained a balance of approximately \$1,416.91.
12. In a letter to the Professional Conduct Committee dated April 26, 2002, Mr. Engel responded to Ms. Hill's Professional Conduct Committee complaint. With respect to her allegation about the Estate Account, Mr. Engel wrote:

With reference to paragraph 14, there is no bank account in the name of the Estate with a sum of \$1,444.85 on which there is a \$15.00 monthly charge being imposed. This office is at a loss in knowing what Mrs. Hill is referring to in paragraph 14.

13. However, as of the date of Mr. Engel's Professional Conduct Committee response, the bank statements show that the Estate Account was still open under Mr. Engel's name with a balance of \$1,184.99.
14. In two subsequent letters to the Professional Conduct Committee dated May 20 and May 23, 2002, Mr. Engel did not mention the Estate Account issue. Mr. Engel simply reaffirmed the status of the Estate Account as stated in Mr. Engel's original April 26th letter.
15. However, at the time Mr. Engel wrote these two letters to the Professional Conduct Committee in May 2002, the Estate Account was still open and, according to Mr. Engel's records, the Bank of New Hampshire continued to send Mr. Engel bank statements for the Estate Account.
16. According to Mr. Engel's records, Mr. Engel closed the Estate Account on May 31, 2002. On that date, the Estate Account had a balance of \$1,185.31, and Mr. Engel signed the financial instrument ("checking closeout debit") formally closing the Estate Account. On that date, the Bank of New Hampshire issued a check for that amount to Mr. Engel's firm's general trust account.
17. As of May 31, 2002, Mr. Engel was aware of the existence of the Estate Account. On that date, Mr. Engel closed the Estate Account and directed that the money be transferred into Mr. Engel's firm's client trust account.
18. For almost nine months thereafter (from May 31, 2002, through February 21, 2003), that money remained in Mr. Engel's firm's client trust account.
19. From May 31, 2002 through February 21, 2003, Mr. Engel did not inform Ms. Hill or the Professional Conduct Committee that Mr. Engel had both located the Estate Account and had decided to place the undistributed funds into Mr. Engel's trust account.
20. On February 21, 2003, Mr. Engel wrote a letter to each beneficiary of the Estate admitting, for the first time, Mr. Engel's accounting mistakes and enclosing two checks to each beneficiary. One of the checks represented the amount due each beneficiary from Mr. Engel's trust account. The other check was written on Mr. Engel's office account and represented the reimbursement due each beneficiary for past service charges on the Estate Account. Mr. Engel forwarded a copy of this letter to the Professional Conduct Committee.
21. Mr. Engel's letter dated February 21, 2003, contained the following explanation:

This office was also concerned with the whereabouts of the balance of the Roy L. White Estate Trust funds undistributed to each of you, as heirs under Mr. Engel's late father's will.

In addition, several other clients complained that there was more money in our trust account than appeared on their billing statements from this office.

As a result, of the apparent errors, which our bookkeeper could not account for, we let our previous bookkeeper go and hired another bookkeeper recommended by this law firm's CPA. An internal audit was performed which resulted in locating the sum of \$1,185.31 in the office trust account.

The Roy L. White Estate was closed by the Rockingham County Probate Court effective October 11, 2001 the balance in the trust account according to the November 2001 bank statement is \$1,459.85. The sum of \$75.00 was paid from this account for attorney fees to Texas counsel for a draft of the Fiduciary Deed to Sherman White leaving a balance of \$1,384.85. Service charges on the account at the rate of \$15.00 per month from October 20, 2001 through June 19, 2002 were deducted leaving a balance of \$1,185.31, as is indicated on the bank statements enclosed. Needless to say, these service charges are not a proper estate expense.

As a result, this office is reimbursing each of you one-eighth of those service charges. Therefore, each of you is receiving two checks, one from the trust account in the amount of \$148.17, representing one-eighth of the trust balance and an office check in the amount of \$25.24 representing one-eighth of the bank service charges from October 2001 through June 2002.

This office sincerely apologizes for the confusion and delay in distribution of the remaining funds in the trust.

You may be interested in knowing that during the course of the internal audit other trust funds were found. The other cases concerned matters still pending in this office and therefore the trust funds in these cases have not been disbursed yet.

If you have any questions, please do not hesitate to contact me.

22. In a letter to the Attorney Discipline Office dated January 10, 2005, Mr. Engel explained Mr. Engel's accounting errors:

In the interim, the office has gone through all dead estate files to see if the estate bank account had been misfiled in another estate file. At the time that I wrote the letter dated April 26, 2002 I was unaware of any bank account still existing with regard to the Estate of Roy White. Between April 26, 2002 and May 31, 2002 the

missing checkbook was found and the funds were then transferred to the Engel & Associates, PA Client Trust Account where they remained until distributed to the heirs of the Estate of Roy White. At the time of my letter of April 26, 2002 I did not think that any such account existed. See copy of check attached hereto.

Rulings of Law:

The above-listed facts, having been found by clear and convincing evidence, the Professional Conduct Committee concludes that there is clear and convincing evidence that David C. Engel has violated the following Rules of Professional Conduct:

Rule 1.3: Lack of Diligence

1. Mr. Engel's lack of attention to details with respect to the closing of the Estate Account and Mr. Engel's failure to properly account for the undistributed funds therein constitutes a lack of diligence with respect to Mr. Engel's obligations to the Estate.
2. By way of example, had Mr. Engel simply reviewed his file (which should have included Mr. Engel's Estate Account bank statements) on January 2, 2001, the date of Ms. Hill's Professional Conduct Committee complaint, Mr. Engel would have discovered the truth of Ms. Hill's allegation. As of that date, the Estate Account was still open in Mr. Engel's name; it remained open for another five months.
3. Mr. Engel's conduct with respect to the undistributed funds in the Estate Account constitutes clear and convincing evidence of a lack of diligence in violation of N.H. R. Prof. Conduct 1.3.

Rule 1.15(2)(b): Failure to Promptly Deliver Funds

4. From May 31, 2002, through February 21, 2003, Mr. Engel retained undistributed funds of the Estate in Mr. Engel's trust account. Mr. Engel failed to promptly deliver this money to his client (Mr. Engel, as personal representative of the Estate) so that the money could be distributed to the beneficiaries in accordance with the terms of Mr. White's Will.
5. Mr. Engel's failure to promptly deliver this money constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.15(2)(b).

Rule 3.3(a)(3): Failure to Take Reasonable Remedial Measures to Correct Professional Conduct Committee Record

6. In Mr. Engel's original reply letter dated April 26, 2002, Mr. Engel claimed to have no knowledge of an open bank account in the name of the Estate. Mr. Engel denied the existence of such an account.

7. On May 31, 2002, Mr. Engel closed the Estate Account. Mr. Engel was, therefore, aware of the existence of the Estate Account (and the undistributed funds therein) on that date.
8. Mr. Engel's denial of the existence of any open estate account was false and material.
9. Mr. Engel waited almost nine months to correct his false, material statement.
10. Mr. Engel's failure to correct the record on this issue in a timely manner constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.3(a)(3).

Rule 3.4(c): Disobey Obligations Under Supreme Court Rule 50(2)(F)

11. Once Mr. Engel transferred the Estate Account money into his firm's trust account, Mr. Engel was required to comply with the obligations of New Hampshire Supreme Court Rule 50(2)(F) with respect to that money.
12. Rule 50(2)(F) requires that attorneys perform reconciliations of their trust accounts on a monthly basis. Had Mr. Engel performed a reconciliation of his trust account in accordance with Rule 50(2)(F), from May 31, 2002 through February 21, 2003, Mr. Engel would have discovered the undistributed Estate Account money. Mr. Engel's failure to abide by Rule 50(2)(F) constitutes a knowing violation of a court rule.
13. Mr. Engel's failure to perform a reconciliation of Mr. Engel's trust account in accordance with Rule 50(2)(F), constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.4(c).

Rule 5.3(a): Failure to Supervise

14. According to Mr. Engel's letter dated February 21, 2003, his then-bookkeeper made accounting and record-keeping mistakes that caused Mr. Engel to lose track of (a) the existence of the open Estate Account, as well as (b) the undistributed funds from the closed Estate Account which were subsequently transferred into Mr. Engel's firm's client trust account.
15. Mr. Engel failed to make reasonable efforts to supervise Mr. Engel's then-bookkeeper and to ensure that his bookkeeper was acting in compliance with the Rules of Professional Conduct.
16. Mr. Engel's failure in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 5.3(a).

Rule 8.4(a): Misconduct for violating the Rules of Professional Conduct

17. Because there exists clear and convincing evidence of violation of the aforementioned rules, there is necessarily clear and convincing evidence of a violation of Rule 8.4(a).

Mitigating Factors:

In considering the sanction, the Professional Conduct Committee considered, in addition to the above findings and rulings, certain mitigating factors that applied in this case:

First, and perhaps most significant, Mr. Engel was suffering from personal difficulties at the relevant time. See ABA Standards § 9.32(c). Specifically, from 2001 through 2002, Mr. Engel's daughter was diagnosed with Ehlers Danlos syndrome, an extremely rare disease that results in a deterioration of the body. During that time frame, his daughter was placed on a feeding tube because she could no longer eat food or ingest medicine on her own. In 2002, the year in which the bulk of the misconduct occurred, her health deteriorated rapidly and to such an extent that Mr. Engel spent a great deal of time away from his office and had difficulty focusing on his work. He would attribute his failures to take proper account of the financial records in the White matter at least partially to his lack of proper focus due to his daughter's disease.

Mr. Engel intended to retire from the practice of law shortly before his daughter was diagnosed with this disease. Mr. Engel is currently 73 years of age. Due to his daughter's medical bills (which, at this point, cost Mr. Engel at least \$1300 per week), Mr. Engel cannot retire and instead must maintain an active law practice.

An additional factor is Mr. Engel's cooperative attitude toward the disciplinary process. Mr. Engel has admitted every allegation in the Notice of Charges, and he has cooperated fully in this process.

Sanction:

Notwithstanding these mitigating factors, the Professional Conduct Committee was very concerned at Mr. Engel's failure to correct the Record, which was his duty and responsibility to do, when he became aware that it was not factual. If not for the overwhelming burden imposed by the above-mentioned mitigating factors, this sanction, in all likelihood, would have been more severe on this fact alone.

Having made the aforementioned findings and rulings and considered the above mentioned mitigating factors, the Professional Conduct Committee concludes that the appropriate discipline in the matter is a Reprimand, and further imposes six hours of live ethical CLE credits, and further requires David C. Engel to reimburse the Professional Conduct Committee for all costs associated with the prosecution of this matter. Finally, David C. Engel shall show proof of compliance to the Professional Conduct Committee no later than July 31, 2006.

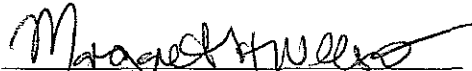
This sanction is in accord with the purposes of attorney discipline as described by the New Hampshire Supreme Court. See, e.g. *Feld's Case* 149 N.H. 19, 28(2002). This sanction is also in

accord with the ABA Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1991). *See, e.g., Shillen's Case* 149 N.H. 132, 139 (2003) (noting that although the Court has never formally adopted these Standards, the Court has considered them when imposing sanctions).

Conclusion:

For all of the above reasons, the Professional Conduct Committee hereby Reprimands David C. Engel, for violating the following New Hampshire Rules of Professional Conduct: 1.3, 1.15(2)(b), 3.3(a)(3), 3.4(c), 5.3(a), 8.4(a).

September, 2005


Margaret H. Nelson, Chair