

New Hampshire Supreme Court  
**Professional Conduct Committee**

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*Howie, Mary advs. Attorney Discipline Office # 07-034*

**PUBLIC CENSURE**

On February 17, 2009, the Professional Conduct Committee heard Oral Argument and deliberated the above captioned matter. Members present included Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, David N. Cole, Thomas P. Connair, Gerald A. Daley, Gretchen Rule Hamel, James R. Martin and Marilyn Billings McNamara. Richard H. Darling was absent. Alan J. Cronheim was recused. Ms. Chollet abstained, as she had not been present for the previous deliberations. Landya B. McCafferty, Disciplinary Counsel, presented at Oral Argument for the Attorney Discipline Office, William B. Parnell, Esquire, presented for the Respondent. Mary Howie, Esquire, was also present.

The Committee previously voted to accept the parties' Stipulation of Facts which established those facts by clear and convincing evidence, as reflected in the Committee's Order dated December 17, 2008.

**I. FINDINGS OF FACT**

1. Ms. Howie is an attorney licensed to practice law in New Hampshire. Ms. Howie was admitted to practice on June 1, 1992. At all times material to this proceeding, Ms. Howie operated her law office as, Howie Law Office at 1 Stiles Road, Suite 103, Salem, New Hampshire 03079.
2. On November 5, 2001, Michael Cunneen was in a serious motor vehicle accident. As a result, Michael suffered permanent disability, including confusion and short term memory loss.
3. Shortly thereafter, Michael's sister, Coleen Walsh, petitioned for guardianship of the person and estate of her brother, which was granted on or about

January 29, 2002, by the Commonwealth of Massachusetts, Essex Division Probate Court, Docket No. 01-P-3255-G11.

4. In 2004, Coleen filed a similar petition for guardianship in New Hampshire. By order dated June 17, 2004, the Rockingham County Probate Court (O'Neill, J.) granted Coleen's petition and appointed her guardian over the person and estate of Michael.
5. In relevant part, the June 17, 2004, Order stated:

After a hearing held at this court, and upon due consideration of the petition for guardianship filed by Coleen Walsh and all the evidence proffered thereon, the court renders the following findings as required by RSA 464-A:9, III (a)-(d), namely:

- (a) Michael Cunneen ("ward") is incapacitated.
- (b) Guardianship is necessary as a means of providing for the ward's continuing care, supervision, and rehabilitation and for the prudent management of the ward's property and financial affairs.
- (c) There are no available alternative resources which are suitable with respect to the ward's welfare, safety or rehabilitation and for the prudent management of the ward's property and financial affairs.
- (d) Guardianship is appropriate as the least restrictive form of intervention consistent with the preservation of the ward's civil rights and liberties.

The court finds that the ward is incapable of exercising the following rights, namely, the right to:

Travel or decide where to live.

Refuse or consent to medical or other professional care, counseling, treatment or service, including the right to be admitted or discharged from any hospital or other medical institution providing such at the lawful direction of the guardian of the person.

Marry or divorce.

Make a will or waive the provisions of a will.

Hold or obtain a motor vehicle operator's license.

Testify in any judicial or administrative proceedings.

Vote.

Have access to, grant release of, withhold, deny, or refuse authorization for the guardian of the person to obtain access to and release of the ward's confidential records and papers insofar as the same may be reasonably needed by the guardian of the person to ensure that the ward's mental, emotional and physical health concerns are properly addressed and treated.

Possess or manage real or personal property or income from any source.

Make gifts.

Lend or borrow money.

Pay or collect debts.

Manage or run a business.

Convey or hold property.

Continue to act as a member of a partnership.

Cancel, reject, or oppose any authority or power of the guardian of the state duly exercised pursuant to this order.

Initiate, defend or settle lawsuits.

Make contracts or grant power of attorney or other authorizations.

Make decisions concerning educational matters and training. . . .

## **GUARDIANSHIP OF THE PERSON**

The guardian of the person shall have the rights and powers specified herein, subject to those orders and limitations also specified herein, namely:

The right and authority to determine where the ward travels or lives.

The right and authority to determine if refusal should be made or consent should be given to any medical or other professional care, counseling, treatment, or service provided however, that:

- a. The guardian of the person shall not have the right or authority to place the ward in the New Hampshire Hospital or a similar state institution, except pursuant to RSA 464-A:25 1,(a), without the prior approval of the court; and

- b. The guardian of the person shall not have the right or authority to give consent to or contract for psychosurgery, electroshock therapies, sterilization or any other experimental or extraordinary treatment or procedure of any nature without the prior approval of the court.

The right and authority to gain access to all confidential records and papers of the ward for the limited purpose of assessing and addressing the ward's personal needs and concerns from time to time.

The duty to file an annual report of the present status, circumstances, and condition of the ward within ninety (90) days of each anniversary date of appointment in accordance with the provisions of RSA 464-A:35.

To the extent not otherwise encompassed within the foregoing, the guardian of the person shall have all of the rights, powers and authorities set forth in RSA 464-A:25.

### **GUARDIANSHIP OF THE ESTATE**

The guardian of the estate shall have all the rights and powers specified herein, subject to those orders and limitations also specified herein, namely:

The guardian of the estate shall have authority to exercise all of the rights and powers set forth in RSA 464-A:26, I and II, except the following, which shall not occur or be undertaken without prior written court approval in each instance:

The guardian over the estate:

- a. Shall not make any gift of any property or assets of the ward.
- b. Shall not sell, mortgage, pledge, lease, or exchange any property of the ward.
- c. Shall not purchase any undivided fractional part of real estate.
- d. Shall not purchase a homestead for the ward.
- e. Shall not use funds from the ward's estate for room, board, or support which the guardian of the estate or the spouse, parent, or child of the guardian of the

estate have furnished the ward.

- f. Shall not apply any assets of the ward's guardianship to the guardian of the estate's own personal benefit, whether or not as compensation for services or out-of-pocket expenses.

The guardian over the estate shall hold all assets of the ward's guardianship in the name of the ward with a notation of the name of the guardian of the estate, and shall not be held in the name of a nominee.

The guardian of the estate shall render annual accountings in accordance with RSA 464-AP:36, and a final accounting in accordance with RSA 464-A:40. . . .

(Emphasis added).

- 6. On June 18, 2004, the Court issued a Certificate of Appointment as follows:

On June 17, 2004, Coleen Walsh . . . was appointed to perform the duties of guardian over the person and estate of Michael Cunneen. . . The rights, duties and powers of the guardian are recited in orders or decrees issued by the court, and are limited or restricted as expressly stated in those documents. The named guardian accepted this responsibility, and the appointment remains in effect as per the records of this court, as of the dated stated below. . . .

- 7. Coleen retained Ms. Howie to represent her in her capacity as guardian of Michael's person and his estate.
- 8. On or about January 5, 2005, Ms. Howie entered an Appearance for Coleen, as guardian for Michael.
- 9. In or about March 2005, Michael and Coleen asked Ms. Howie to prepare a will for Michael.
- 10. Ms. Howie prepared the Will. Coleen was present in Ms. Howie's office but not in the room where the will was signed, when, on March 24, 2005, the Will was executed by Michael (hereinafter referred to as "Will 1").
- 11. Will 1 left Michael's entire estate to Coleen and named Coleen as executrix.

12. At the time Will 1 was drafted and executed, Michael was incapacitated and incapable of making a will pursuant to the Court's order of June 17, 2004.
13. In or about July 2006, Michael wanted to change Will 1.
14. Michael called Ms. Howie's office on one occasion to prepare and then went to Ms Howie's office without Coleen to execute a second will (hereinafter referred to as "Will 2"). At the time Will 2 was drafted, Ms Howie was aware of the Court's order of June 17, 2004 declaring that Michael was incapacitated and incapable of making a will.
15. Coleen was not aware of Michael's intention to void Will 1 and drafting Will 2.
16. Will 2 was drafted by Ms. Howie. It was executed by Michael at Ms. Howie's office on July 11, 2006.
17. At the time of its creation, Coleen was not aware of the content of Will 2.
18. In Will 2, Michael left his estate to his nieces and nephews, and expressly omitted Coleen and Michael's other siblings as beneficiaries. Will 2 named Ms. Howie as executrix. Will 2 named the Office of Public Guardian as Michael's chosen guardian.
19. In or about November 2006, Michael told Coleen that he had done something "wrong," and then he told her about the content of Will 2.
20. By Order dated November 14, 2006, Joseph J. Tropiano, Esq., was appointed to represent Michael.
21. In its November 14, 2006, Order, the Court requested that Mr. Tropiano investigate Michael's guardianship and report back to the Court.
22. On or about March 19, 2007, following his investigation, Mr. Tropiano filed a "Report of Counsel."
23. In his report, Mr. Tropiano recommended, *inter alia*, that the Court declare Wills 1 and 2 "to be legally invalid." Mr. Tropiano reasoned that neither Will 1 nor Will 2 was legally valid because, in the Court's June 17, 2004, Order, the Court expressly found that Michael lacked the capacity to make a will.
24. On May 31, 2007, a hearing was held to determine the validity of Wills 1 and 2.

25. David Wolowitz, Esq., represented Coleen; William B. Parnell, Esq., represented Ms. Howie; and Mr. Tropiano's associate appeared as the court-appointed representative of Michael.
26. On May 31, 2007, the Court (Hurd, J.) issued an Order finding that Wills 1 and 2 were legally invalid. The Court held: "Both wills were executed in violation of the Court's Order of June 17, 2004 and are in violation of the provisions of RSA 464-A:40." A Motion for Clarification and Reconsideration was filed June 15, 2007, on behalf of Ms Howie and was denied without explanation.

## II. RULINGS OF LAW

Also reflected in the Order dated December 17, 2008, the Committee voted to accept the Stipulation to the Rule Violations of N.H. R. Prof. Conduct 1.1(a): Competence, 1.7(a): Conflict of Interest and 8.4(a): Misconduct, which established those violations by clear and convincing evidence.

### **Rule 1.1(a): Competence**

27. Allegations set forth above are incorporated by reference.
28. At all relevant times, the June 17, 2004, Rockingham County Probate Court Order establishing a guardianship over Michael's person and estate was in effect.
29. At all relevant times, Ms. Howie represented Coleen, in Coleen's role as guardian over Michael's person and estate.
30. Ms. Howie owed Coleen, in her role as guardian, a duty to provide Coleen with competent representation.
31. The Order creating the guardianship held that Michael was incapacitated and incapable of, *inter alia*, making a will.
32. By drafting and finalizing the execution of Wills 1 and 2, Ms. Howie took actions inconsistent with the Court's June 17 Order.
33. Ms. Howie breached her duty to provide competent representation to Coleen, as guardian, when Ms. Howie drafted and finalized the execution of Wills 1 and 2.

34. At a minimum, Ms. Howie had an obligation to advise Coleen that the Order creating her guardianship over Michael expressly precluded Michael from making a will. Ms. Howie did not so advise Coleen.
35. As lawyer for the guardian, Ms. Howie also had a duty to advise Coleen of the provisions of RSA 464-A, governing guardians and conservators. For example, RSA 464-A:26-a provides a detailed statutory procedure governing estate planning by a guardian. Ms. Howie did not so advise Coleen.
36. Ms. Howie's failures to advise her client of (a) the June 17, 2004, Order, which expressly prohibited Michael from making a will; and (b) the provisions of RSA 464-A, constitute legal incompetence.
37. Ms. Howie's failures to properly advise Coleen with respect to Michael's legal capacity to make a will, and Ms. Howie's decision to draft and finalize the execution of Wills 1 and 2, constitute clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.1(a).

**Rule 1.7(a): Conflict of Interest**

38. Allegations set forth above are incorporated by reference.
39. At all relevant times, Ms. Howie represented Coleen as guardian over Michael's person and estate.
40. The June 17, 2004, Order creating the guardianship establishes that Coleen is the court-appointed designee to make, *inter alia*, legal decisions in the best interest of Michael's person and his estate.
41. The June 17, 2004, Order creating the guardianship further establishes that Michael was incapacitated and was not capable of making a will.
42. In drafting and finalizing the execution of Will 2, Ms. Howie provided legal representation to Michael.
43. In Will 2, Michael disinherited Coleen and his other siblings, and removed Coleen as guardian and executrix.

44. Ms. Howie could not have reasonably believed her representation of Michael in preparing Will 2 would not adversely affect her relationship with Coleen in Coleen's capacity as guardian.
45. At no time was there an informed consent by Coleen to Ms. Howie during the preparation and execution of Will 2.
46. At no time did Michael have the capacity to consent to Ms. Howie's dual representation.
47. For the reasons stated above, *see supra* at ¶s 30-40, Will 2 was legally invalid and therefore directly adverse to the interests of Coleen, as guardian.
48. Ms. Howie's representation of Michael in the drafting and execution of Will 2 constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.7(a).

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

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

The Committee voted to accept the Stipulation to the removal of a violation of N.H. Rule Prof. Conduct 3.4(c): Knowingly Disobeying the Rules of a Tribunal.

### III. ANALYSIS

In assessing the appropriate sanction in attorney discipline cases, the Committee must remain "mindful that the purpose of attorney discipline is not to inflict punishment, but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *Grew's Case*, 156 N.H. 361, 365 (2007). Each attorney discipline case is judged on "its own facts and circumstances, taking into account the severity of the misconduct and any mitigating circumstances appearing in the record." *Id.*

In assessing the propriety of a particular sanction, the Committee looks for guidance to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*"). *Id.* The *Standards* set forth a four part analysis for the Committee 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. *Standard 3.0; Grew's Case*, 156 N.H. at 365.

The first three steps create the framework for characterizing the misconduct and determining a baseline sanction. *See, e.g., 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, e.g., 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, Ms. Howie violated one of the fundamental obligations of the legal profession: to provide competent representation to her clients. Ms. Howie also violated her duty to provide representation that is free from conflicts of interest. These are serious violations.

The second prong of the three-part test requires analysis of Ms. Howie’s mental state. The most serious misconduct in this case is the Rule 1.1(a) violation, which, in many ways, also led Ms. Howie to engage in the conflict of interest. With respect to her incompetence, Ms. Howie acted with gross negligence. Before drafting both Wills 1 and 2, Ms. Howie should have reviewed both the Court’s June 17, 2004, Guardianship Order, and the relevant probate statutes. Under the circumstances, Ms. Howie’s failure to consult the governing document and statutes constitutes gross negligence.

The third prong requires analysis of the injury, or potential injury, Ms. Howie’s client suffered as a result of her misconduct. Ms. Howie’s client in this matter was the guardianship. The guardianship was exposed to potential significant harm. Fortunately for the guardianship, the Court simply vacated Wills 1 and 2 as invalid, and Ms. Howie was removed as attorney for the guardianship. Further, Ms. Howie reimbursed the guardianship for legal fees billed in connection with her work related to Wills 1 and 2. Although some of the harm to the guardianship was minimized by the Court’s ruling and by Ms. Howie’s repayment of legal fees, the guardianship was also burdened with a legal proceeding made necessary only because of Ms. Howie’s misconduct. Ultimately, had Ms. Howie provided the guardianship with competent representation, the hearings on the validity of Wills 1 and 2 would have been unnecessary. Ms. Howie’s misconduct caused an unnecessary use of judicial resources. In addition, Coleen lost confidence in Ms. Howie as a result of her incompetence and conflicted representations. Any time a client loses trust in her lawyer as a result of the lawyer’s ethical misconduct, the reputation of the legal profession as a whole suffers.

Any sanction in this case should account for the actual and potential harm to both Ms. Howie’s client and the legal profession as a result of Ms. Howie’s misconduct.

Before determining a baseline sanction, it is helpful to look to the *Standards* for guidance. *Standard 4.5* outlines the factors to consider in determining a baseline sanction when an attorney has failed to provide competent representation. *Standard 4.5* entitled “Lack of Competence,” provides:

- 4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.
- 4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.
- 4.53 Reprimand<sup>1</sup> is generally appropriate when a lawyer:
- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
  - (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.
- 4.54 Admonition<sup>2</sup> is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

Of the above-listed sections of *Standard 4.5*, the most applicable appears to be section 4.53(a). In this matter, Ms. Howie demonstrated a "failure to understand" the relevant probate principles and procedures and her misconduct caused injury to the guardianship.

Having considered the three-prong test, alongside the language of *Standards* § 4.53(a), Ms. Howie's misconduct warrants a baseline sanction of public censure. A public censure is also appropriate once the aggravating and mitigating factors are considered.

There are no aggravating factors in this matter. With respect to the mitigating factors, there are three. First, Ms. Howie does not have a disciplinary history. *See Standards* § 9.32(a). Second, Ms. Howie lacked a dishonest or selfish motive. *See Standards* § 9.32(b). Third, Ms. Howie has maintained a cooperative attitude toward the disciplinary proceedings. *See Standards* § 9.32(e). Although these mitigating factors are significant, particularly Ms. Howie's lack of a disciplinary history, they do not provide a sufficient basis to reduce the baseline sanction in this case. The incompetence was egregious and was compounded by the conflict of interest; the misconduct is deserving of a public censure.

Taking into consideration the four-part analysis recommended by the *Standards*, New Hampshire case law, and the purposes of attorney discipline in New Hampshire, a public censure

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1 Section 4.53 uses the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

2 Section 4.54 uses the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

is appropriate. A public censure accords significant weight to the mitigating factors and takes into account the severity of the misconduct in Ms. Howie's case. A public censure would serve all of the goals of attorney discipline in New Hampshire.

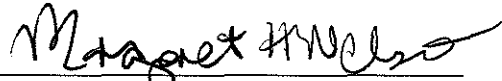
#### IV. SANCTION

The Committee voted to accept the Stipulation to a Public Censure.

#### V. CONCLUSION

The Committee voted to accept the Stipulation to Respondent's reimbursement of all expenses associated with the investigation and prosecution of this matter.

April 27, 2009



Margaret H. Nelson  
Chair

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