

New Hampshire Supreme Court

Professional Conduct Committee

Margaret H. Nelson, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
Susan R. Chollet*
David N. Cole
Thomas P. Connair
Alan J. Cronheim

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Gerald A. Daley*
Richard H. Darling*
Gretchen Rule Hamel
James R. Martin
Marilyn Billings McNamara
* non attorney member
Holly B. Fazzino, Admin. Coordinator

Notaris, Mary advs. Attorney Discipline Office # 07-059

PUBLIC CENSURE

On March 17, 2009, the Professional Conduct Committee deliberated the above matter. Members present included: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Susan R. Chollet, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Gretchen Rule Hamel, James R. Martin and Marilyn Billings McNamara. Toni M. Gray and Richard H. Darling were recused.

I. FINDINGS OF FACT

The Committee voted to accept the Stipulation as to the Facts, which established those facts by clear and convincing evidence.

1. Ms. Notaris is an attorney licensed to practice law in New Hampshire. Ms. Notaris was admitted to practice on June 19, 1992. At all times material to this proceeding, Ms. Notaris operated her law office as Notaris Law Office, 45 Stiles Road, Unit 104, Salem, New Hampshire 03079.
2. Barbara Pierce (the Complainant) and Brenda Smith were in a committed relationship between 1996 and June 2006. During the relationship, Barbara gave birth to two children through artificial insemination.
3. In January 2003, Barbara and Brenda retained Ms. Notaris to assist them in their estate planning. Ms. Notaris drafted their Wills, power of attorney documents, and a trust document that provided for their children in the event of their death. Barbara and Brenda indicated an interest in pursuing a co-guardianship for the children, but expressed a desire to wait until some time in the future when they might have more funds to pay for Ms. Notaris to complete the legal work necessary for a co-guardianship.

4. In or about December 2003 through January 2004, Barbara and Brenda retained Ms. Notaris to handle a minor transaction related to the trust and the refinancing of their jointly owned home.
5. In early June 2005, Barbara informed Brenda that she wanted to end their relationship, as she had begun dating someone else. Barbara asked Brenda to move out of the house. Brenda explained to Barbara that she would not agree to move out of the house unless a co-guardianship agreement was finalized, so that her ability to co-parent the children was protected.
6. Barbara did not want the co-guardianship, but Barbara did not express that fact to Brenda. Rather, Barbara expressed agreement with the idea of a co-guardianship.
7. On or about June 5, 2005, Brenda telephoned Ms. Notaris and explained that she and Barbara were experiencing problems in their relationship and were breaking up. Brenda explained that she wanted to change her power of attorney so that Barbara was no longer listed as the designated person on her power of attorney.
8. On June 7, 2005, Barbara telephoned Ms. Notaris's office and explained that she wanted to change her power of attorney and to designate someone other than Brenda.
9. On June 8, 2005, Barbara went to Ms. Notaris's office and executed her new power of attorney document, which Ms. Notaris had prepared. At that time, Ms. Notaris and Barbara had a discussion about the pending separation and the former couple's plans regarding the children. During that meeting, Barbara expressed her intent to parent the two minor children jointly with Brenda.
10. On June 9, 2005, Brenda went to Ms. Notaris's office and executed her new power of attorney document, which Ms. Notaris had prepared.
11. In their new estate planning documents, Barbara and Brenda both changed their designated powers of attorney; each of them removed the other as the designated power of attorney. However, in those same documents, they each retained a paragraph naming the other person as the guardian of the children in the event of death or incapacity.
12. During this time-frame, Barbara began to explore the possibility of refinancing the house to purchase Brenda's interest. When Barbara told Brenda about this possibility, Brenda informed Barbara that she would not cooperate with the refinancing unless she was made a co-guardian of the

children. Ms. Notaris would testify that she was unaware of Brenda's demands with respect to the real estate and the co-guardianship. Barbara would testify that she informed Ms. Notaris of Brenda's demand with respect to the real estate and the co-guardianship during the joint representation.

13. Barbara proceeded with arrangements to refinance the house and purchase Brenda's interest, and a closing was scheduled for August 4, 2005.
14. In or about late June or early August 2005, Barbara and Brenda went to Ms. Notaris' office to discuss with her their plans for a guardianship. Ms. Notaris understood that they were ending their relationship. Ms. Notaris informed Barbara and Brenda that she could represent both of them so long as they were "in agreement" about how they wanted to handle their separation.
15. During the meeting, Barbara and Brenda had all the outward appearances of being in agreement with respect to a co-guardianship. Barbara did not mention anything about her feelings of being pressured into the co-guardianship by Brenda. Ms. Notaris thought they were in complete agreement about drawing up a co-guardianship agreement.
16. At some point thereafter, Ms. Notaris prepared a draft "Settlement Agreement" for Barbara and Brenda, which outlined the terms of their separation.
17. The draft Settlement Agreement specified, *inter alia*, that Barbara would pay Brenda \$18,000.00 for her share of the equity in the house and that Brenda would sign a quitclaim deed transferring her interest in the house to Barbara. The draft Settlement Agreement also stated that Barbara and Brenda agreed to pursue a co-guardianship for the children.
18. Barbara and Brenda signed the guardianship petitions (one petition for each child) prepared by Ms. Notaris, on August 3, 2005.
19. On the morning of the closing on the house, August 4, 2005, Brenda informed Barbara that she would sign the necessary paperwork at the closing only if Barbara would sign a separate written agreement guaranteeing the co-guardianship. Although the guardianship petitions had been signed, they had not been filed and the guardianship was not final. Brenda conditioned her signature at the closing on a written agreement insuring that Barbara would go through with the co-guardianship.

20. After learning this, Barbara telephoned Ms. Notaris on August 4, 2005, at 10:03 a.m. Barbara would testify that she told Ms. Notaris that Brenda would not sign the necessary paperwork at the closing without some form of written agreement regarding the co-guardianship. Ms. Notaris would testify that Barbara only informed her that she needed a copy of the draft "Settlement Agreement," *see supra* at ¶ 15, in time for the real estate closing later that day.
21. On August 4, 2005, at 3:09 p.m., Ms. Notaris's office faxed a copy of the draft Settlement Agreement to Barbara and Brenda. Ms. Notaris did not learn that Barbara and Brenda had actually executed the "Settlement Agreement" until some time after her representation of them had concluded.
22. Ultimately, Brenda signed the quitclaim deed conveying her interest in the property to Barbara, and the closing went through as planned.
23. On or about August 4, 2005, Ms. Notaris filed the guardianship petitions and her Appearance on behalf of Barbara and Brenda in Hillsborough County Probate Court.
24. On August 5, 2005, Barbara and Brenda signed the draft Settlement Agreement in front of a notary public.
25. By order dated September 23, 2005, the Probate Court scheduled a hearing on the guardianship petitions for November 1, 2005.
26. On November 1, 2005, Ms. Notaris appeared with Barbara and Brenda at Probate Court for the hearing on the guardianship petitions.
27. The hearing occurred entirely within Judge Cloutier's chambers, and was very short, lasting only 5-10 minutes. In chambers, Judge Cloutier queried Barbara about the rights she was giving up, as the biological mother, in agreeing to the co-guardianship. Judge Cloutier granted the guardianship petitions, appointing Barbara and Brenda as co-guardians of the children.
28. Barbara would testify that, prior to the hearing, Barbara had no understanding or awareness that, had she objected to the guardianship, Brenda would have had a very high burden to overcome in order to acquire guardianship rights. Both Barbara and Brenda would testify that Ms. Notaris had not explained to either of them that, because Barbara was the biological parent in this situation, Barbara had priority under the law. Ms. Notaris would testify that, in advance of the November 1, 2005, hearing,

she adequately explained Barbara's superior legal rights to both Barbara and Brenda.

29. As a result of a subsequent dispute regarding custody of the children, Barbara and Brenda sought separate legal counsel. On November 16, 2006, Ms. Notaris filed a withdrawal.
30. It was only after Barbara consulted with her new counsel, Margaret C. Hall, Esq., and later, Andrew J. Piela, Esq., that Barbara understood her superior rights as the biological parent of the children under the guardianship statute.
31. In April of 2007, Barbara filed a motion to terminate the guardianship on grounds that, *inter alia*, Ms. Notaris, was operating under a conflict of interest at the time she advised Barbara with respect to the guardianship petitions.

II. RULINGS OF LAW

The Committee voted to accept the Stipulation as to the violation of N.H. Rules of Professional Conduct 1.7(b): Conflict of Interest, and 8.4(a): Misconduct, which establishes those violations by clear and convincing evidence.

Rule 1.7(b): Conflict of Interest

32. Factual findings set forth above are incorporated by reference.
33. Rule 1.7(b), applicable at the time of Ms. Notaris's conduct states:
 - (a) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

34. Pursuant to Rule 1.7(b), Ms. Notaris has an obligation to provide conflict-free legal advice to her clients.
35. In this case, Ms. Notaris violated that obligation.
36. Ms. Notaris did not advise Barbara and/or Brenda about the potential negative consequences of the joint representation and, given the difference in their rights under the guardianship statute, Ms. Notaris could not reasonably have believed that her representation of one client would not be materially limited by her representation of the other. Moreover, Ms. Notaris did not obtain the knowing consent of Barbara and Brenda.
37. Even if Ms. Notaris had secured her clients' knowing consent, a disinterested lawyer would conclude that Barbara and Brenda should not agree to the representation under the circumstances. *See Kelly's Case*, 137 N.H. 314, 319 (1993) (holding that even with client consent, certain conflicts cannot be waived).
38. Ms. Notaris's representation of both Barbara and Brenda under these circumstances constitutes an unwaivable conflict of interest.
39. Ms. Notaris's conduct constitutes clear and convincing evidence of a violation of N. H. R. Prof. Conduct 1.7(b).

Rule 8.4(a): General Rule

40. Because there is clear and convincing evidence that Ms. Notaris violated the above rule, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

III. ANALYSIS

Both case law in New Hampshire and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support the conclusion that Ms. Notaris should be publically 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.” *Standard 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, Ms. Notaris violated a duty to her clients to provide them with conflict-free representation. This is a fundamental duty.

The second prong requires analysis of Ms. Notaris’s state of mind. Ms. Notaris’s mental state is best characterized as both knowing and negligent. Ms. Notaris’s state of mind was knowing in that, while representing Barbara and Brenda, Ms. Notaris was aware of the adverse relationship between them brought on by the break-up. Ms. Notaris was also aware that, as a matter of law, Barbara held a superior position with respect to the co-guardianship petition. Ms. Notaris’s mental state was negligent in that she failed to recognize that her representation of Barbara and Brenda involved a conflict of interest, as defined by the Rules of Professional Conduct.

Ms. Notaris genuinely believed that Barbara and Brenda were in complete agreement about the co-guardianship, and that, as such, representing both of them in regard to guardianship did not involve a conflict. In Ms. Notaris’s view, their position on co-guardianship was consistent with the position that they had expressed to Ms. Notaris at an earlier time, while they were still together as a couple. Further, Ms. Notaris held a subjective belief, based on her years of practicing family law, that lesbian couples who were “divorcing” one another (unlike heterosexual couples) were uniquely able to place their self-interest aside and focus on the well-being of the children.

By ignoring the inherent conflict in her clients’ relationship, and placing her trust in the apparent lack of outward conflict between them, Ms. Notaris acted negligently. She should have

known that the demise of her clients' relationship caused an impermissible conflict of interest, one which neither client could waive.

While clearly negligent, Ms. Notaris's mental state was not purposeful or intentional, however, as she did not intend to favor one client at the expense of the other or otherwise cause harm to Barbara's legal status with respect to the guardianship of her children.

The third prong of the analysis requires an examination of the harm caused by Ms. Notaris's misconduct. The harm in this case was serious. Barbara would testify that, had she been advised of the superior nature of her legal rights with respect to the guardianship, she would never have agreed to grant Brenda co-equal status as guardian.

Ultimately, Barbara had to retain a new attorney, Mr. Piela, of Hamblett & Kerrigan, P.A., to represent her in an action to petition the Court to vacate the co-guardianship. One of Barbara's legal contentions in that legal proceeding was that the co-guardianship should be declared null and void due to the fact that Barbara's former attorney, Ms. Notaris, was operating under an impermissible conflict of interest at the time she advised Barbara to petition the Court for the co-guardianship Order. That litigation ended with a settlement, but it was costly and emotionally draining for both Barbara and Brenda.

Ms. Notaris claims that Barbara was aware of her superior legal status with respect to the guardianship issue, and that she did not oppose Ms. Notaris's joint representation. Nonetheless, Ms. Notaris concedes that Barbara apparently did not properly understand her legal rights with respect to the co-guardianship, and that Barbara would have been better served by an attorney who had no conflict of interest and whose loyalties were not divided between Barbara and Brenda.

Ms. Notaris now understands and concedes that, by representing both Barbara and Brenda in the guardianship case, she engaged in a conflict of interest. Ms. Notaris further concedes that the harm caused by her misconduct was serious.

The applicable ABA Standard for a Rule 1.7 violation is *Standard 4.3*, entitled "Failure to Avoid Conflicts of Interest." That Standard provides:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

- (a) engaged in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand¹ is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4:34 Admonition² is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

Considering the facts in this case, section 4.33 appears to be the most applicable. Ms. Notaris was negligent in determining whether her representation of both Barbara and Brenda adversely affected Barbara, and her negligence caused serious injury to Barbara. *See Shillen's Case*, 149 N.H. 132, 139-40 (2003) (applying section 4.33, where respondent should have known of conflict, but was negligent in not recognizing it and caused serious injury thereby). Section 4.31 does not apply because Ms. Notaris had no intent to benefit herself, a key element of that section.

1 Section 4.33 uses the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

2 Section 4.34 uses the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

Section 4.32 is, however, a closer call. Section 4.32 requires the respondent to have been aware of the conflict of interest but have failed to advise the client of the possible side effects of the conflict. Here Ms. Notaris did not believe she was engaged in a conflict of interest; she should have been aware of the conflict but she was not. As such, section 4.32 is not as appropriate as section 4.33 in providing a baseline sanction. Neither section 4.32 nor 4.33 requires a showing of “serious” injury to the client, although serious injury is present in this case.

Finally, section 4.34 does not appear applicable because that section is reserved for cases where the respondent’s misconduct caused “little or no actual injury” Here, although Ms. Notaris’s representation of Barbara and Brenda in the guardianship may be considered one instance of misconduct, that misconduct caused serious injury to Barbara.

Based upon the first three prongs of the test, as well as the guidance provided by section 4.33, a public censure appears to be the appropriate baseline sanction. *See Shillen’s Case*, 149 N.H. at 139-40 (public censure appropriate baseline sanction for 1.7(a) violation).

A discussion of the aggravators and mitigators follows.

With respect to aggravating factors, there is only one. Ms. Notaris has a prior disciplinary history. *See Standards* §9.22(a). Specifically, in an Order dated June 11, 2001, the Committee issued a Reprimand to Ms. Notaris for violations of Rules 1.5(a) (excessive fee) and 1.16(d) (failure to turn over client file).

There are several mitigating factors in this case. First, Ms. Notaris acted without a dishonest or selfish motive. To the contrary, Ms. Notaris’s legal career has been devoted to providing legal services to gays and lesbians and protecting their civil rights. This case was no exception. Ms. Notaris’s goal was to ensure that Barbara’s and Brenda’s stated objective (*i.e.*, to continue jointly parenting the children) was protected by the law. Unfortunately, Ms. Notaris failed to provide her clients with the equally laudable goal of conflict-free representation. Nonetheless, her overall motivation was neither self-interested nor dishonest.

Second, Ms. Notaris has made a full and free disclosure to the Attorney Discipline Office and has maintained a cooperative attitude toward these proceedings. *See Standards* §9.32(e).

Third, and finally, Ms. Notaris has expressed genuine remorse for the harm that her misconduct caused Barbara. Ms. Notaris has stated that she will not accept a case such as this in the future, even in a situation where the couple seems in agreement and expressly requests joint

representation. Ms. Notaris has clearly learned from this experience. Her expression of remorse coupled with her desire not to repeat her misconduct are compelling mitigators.

The New Hampshire Supreme Court has repeatedly stated that punishment is not a goal of attorney discipline. *See, e.g., Grew's Case*, 156 N.H. 361, 365 (2007). Rather, the purposes of attorney discipline are primarily to restore public confidence and to protect the public. *See, e.g., id.* A public censure in this case would serve the goals of attorney discipline.

IV. SANCTION

Taking into consideration the four-part analysis recommended by the *Standards*, New Hampshire case law, and the purposes of attorney discipline in New Hampshire, it is the Committee's view that the public can be protected, public confidence in the Bar can be maintained, and the integrity of the legal profession can be preserved by imposing a Public Censure. This sanction gives significant weight to the seriousness of Ms. Notaris's misconduct as well as the mitigating factors in Ms. Notaris's case, and serves all of the goals of attorney discipline in New Hampshire.

V. COSTS

The Committee voted to accept the Stipulation as to Costs. Respondent shall pay all costs associated with the investigation and prosecution of this matter.

VI. CONCLUSION

Based on the above reasons, having found violations of N.H. R. Prof. Conduct 1.3; 1.4 and 8.4(a) by clear and convincing evidence, the Professional Conduct Committee issues a Public Censure to the respondent.

April 27, 2009


Margaret H. Nelson, Chair

Distribution:

Landya B. McCafferty, Disciplinary Counsel
Russell F. Hilliard, Esquire
File