

New Hampshire Supreme Court  
**Professional Conduct Committee**

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**RECOMMENDATION FOR 1 YEAR SUSPENSION, SUSPENDED FOR TWO YEARS**

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

**I. FINDINGS OF FACT**

In preparation for Oral Argument and for subsequent deliberations the Committee reviewed the voluminous record of this case. Upon deliberating the Committee voted to accept the findings of fact made by the Hearing Panel, as having been found by clear and convincing evidence (renumbered):

1. Respondent, Nancy S. Tierney, is a licensed New Hampshire attorney who was admitted to the New Hampshire Bar on June 3, 1986. At all times material to this proceeding, Ms. Tierney has operated as a sole practitioner at the Law Office of Nancy S. Tierney, 1 Court Street, Suite 360, Lebanon, New Hampshire 03766.

Ms. Tierney's current office address is Law Office of Nancy S. Tierney, 29 School Street, Lebanon, New Hampshire.

2. In or about July, 1998, Alfred Carbone of Allenstown, New Hampshire, retained Ms. Tierney to pursue a claim against his son and daughter-in-law, Daniel and Lisa Carbone of Danvers, Massachusetts.
3. Ms. Tierney and Mr. Carbone executed a contingency fee agreement relating to the pursuit of Mr. Carbone's claim on November 11, 1998.
4. Mr. Carbone sought to recover approximately \$69,000, representing a portion of the proceeds of the sale of his house in Londonderry, New Hampshire, which he had given to Daniel and Lisa. The parties apparently had agreed to sell their respective homes and purchase a new one. The new house was to include an apartment for Mr. Carbone.
5. Mr. Carbone claimed that Daniel and Lisa had breached the agreement and defrauded him. They allegedly took the proceeds of the sale of Mr. Carbone's house and used the money for purposes other than buying a new house or making improvements to accommodate Mr. Carbone. According to Mr. Carbone, Daniel and Lisa also delayed purchasing a new house, causing Mr. Carbone to have to live in the basement of the Danvers property.
6. On July 14, 1998, Ms. Tierney wrote to Mr. Carbone to address the question whether his suit should be brought in state or federal court. Anticipating jurisdictional issues in the New Hampshire and Massachusetts state courts, she

recommended filing in the United States District Court for the District of New Hampshire.

7. Ms. Tierney referred in her letter of July 14, 1998, to diversity jurisdiction required for suit in federal court. She did not discuss with Mr. Carbone the requirement that a certain level of damages was required in order to satisfy subject matter jurisdiction requirements in a federal court diversity action.
8. Ms. Tierney had not previously represented a client in a federal diversity case; she was unaware of the minimum level of damages required to satisfy subject matter jurisdiction requirements in a federal diversity action; she did not consult current law applicable to diversity jurisdiction; she did not consult current rules of federal procedure; and she did not consult other counsel with current knowledge and experience in federal litigation.
9. As a result of the foregoing, Ms. Tierney misapprehended the law pertaining to minimum damages required for subject matter jurisdiction in a federal diversity case.
10. Mr. Carbone's claim appeared initially to involve approximately \$20,000 in damages.
11. On August 8, 1998, Ms. Tierney filed a complaint against Daniel and Lisa in the United States District Court for the District of New Hampshire, invoking the Court's diversity jurisdiction. The complaint alleged an amount in controversy exceeding \$10,000, exclusive of interest and costs. It contained a specific allegation that Mr. Carbone had suffered \$69,000 in damages.

12. The United States District Court Clerk's office rejected the filing because the signature page on the complaint was not signed and Court rules precluded acceptance of a personal check from Mr. Carbone tendered by Ms. Tierney for the filing fee. Ms. Tierney was also advised that she had used an outdated form for service of process by the United States Marshall, and that she should consult a current version of the federal rules.
13. Filing errors were corrected and Ms. Tierney filed returns of service on September 16, 1998.
14. Mr. Carbone was severely hearing impaired during the course of his attorney/client relationship with Ms. Tierney and Ms. Tierney was aware of such impairment from the outset. Mr. Carbone had considerable difficulty hearing and understanding Ms. Tierney's explanations about the case and he asked Ms. Tierney to communicate with him in writing.
15. As the matter progressed, Ms. Tierney recognized that, on a number of occasions, Mr. Carbone was not hearing what she was telling him about questions arising in his case.
16. The defendants filed three motions to dismiss on September 24, 1998, contesting jurisdiction.
17. The defendants disputed personal jurisdiction on grounds that plaintiff could not establish "minimum contacts" necessary to permit out-of-state service of process under New Hampshire's Long-Arm Statute and that the summons served on defendants was not accompanied by a copy of the underlying complaint.

18. Defendants also moved to dismiss on grounds that Mr. Carbone had failed to establish subject matter jurisdiction because he did not claim a minimum amount in controversy of \$75,000, as required under current federal law.
19. Ms. Tierney wrote to Mr. Carbone on September 25, 1998, advising him that the defendants had filed a "Motion to Dismiss" on grounds that no copy of the complaint was attached to the summons, and that she was taking care of that issue.
20. In her letter of September 25, 1998, Ms. Tierney did not advise Mr. Carbone that the defendants had also moved to dismiss the complaint for lack of subject-matter jurisdiction.
21. Ms. Tierney did not otherwise timely or effectively inform Mr. Carbone that the defendants had challenged the complaint on grounds there was no subject-matter jurisdiction.
22. On October 1, 1998, Ms. Tierney sent a message to Mr. Carbone asking for information relating to the amount of damages he claimed in connection with replacing his laboratory. By message of October 5, 1998, Ms. Tierney acknowledged receipt of such information.
23. On or about October 2, 1998, Ms. Tierney drafted objections to the defendants' motions to dismiss. She undertook to challenge claims of no subject matter jurisdiction and no personal jurisdiction in a combined pleading.
24. Ms. Tierney sent her combined responsive pleading to the United States District Court. However, the Clerk's office promptly returned the pleading to Ms. Tierney

and advised that her combined filing in response to defendants' motions to dismiss was defective as to form and would not be docketed.

25. Ms. Tierney's aforesaid combined responsive pleading was not accepted for filing.
26. Rule 7.1 of the local United States District Court Rules provides that "objections to pending motions . . . shall not be combined in one filing."
27. Notwithstanding the Clerk's notice that her response to defendants' motions to dismiss was defective and was rejected, Ms. Tierney did not thereafter file timely objections to such motions, in compliance with applicable United States District Court Rules.
28. Nor did Ms. Tierney, at any time prior to expiration of the deadline for objecting to defendants' motions to dismiss, undertake to file a voluntary non-suit without prejudice or to request leave of the Court to amend the complaint.
29. On October 22, 1998, the Court disposed of defendants' motions to dismiss. It found that no objection had been filed to the motion to dismiss for lack of subject matter jurisdiction and, on that basis, it granted that motion. In light of the dismissal for lack of subject matter jurisdiction, the Court ruled that the remaining motions to dismiss were moot.
30. Judgment was entered in favor of the defendants on October 23, 1998.
31. Copies of the referenced orders of October 22 and 23, 1998, were forwarded by the U.S. District Court Clerk to Ms. Tierney.
32. On October 27, 1998, Ms. Tierney filed a Motion for Late Entry, with Objections to each of defendants' aforesaid motions to dismiss; a Motion to Vacate the

Judgment; and a Motion to Amend Complaint, to increase the amount of damages claimed.

33. Ms. Tierney did not send copies to or otherwise apprise Mr. Carbone of the aforementioned filings of October 27, 1998.
34. On October 29, 1998, each of Ms. Tierney's motions (filed October 27) was denied upon the Court's finding that the "case has been dismissed." Copies of the Court's orders were forwarded to Ms. Tierney.
35. Ms. Tierney did not appeal the Court's aforesaid rulings and orders of October 22, 23, and 29, 1998.
36. On October 30, 1998, Ms. Tierney wrote to Mr. Carbone stating, "I am writing to advise you of the status of your case." Ms. Tierney advised that she was in the process of "re-serving" the complaint for the purpose of increasing the amount of damages claimed. She also advised that "the other side has filed Motions to Dismiss and we have countered with Objections to said Motions."
37. In her October 30, 1998, correspondence, Ms. Tierney made no reference to the Court's rulings and orders of October 22 and 23, 1998, granting defendants' motions to dismiss and entering judgment for the defendants.
38. At the time of her correspondence of October 30, 1998, Ms. Tierney knew that the case had been dismissed.
39. In her October 30 correspondence, Ms. Tierney made no reference to the Court's orders of October 22 and 23 because she assumed that her motions of October 27 would be granted and that the case would be back on track. Nor did Ms. Tierney

apprise Mr. Carbone of the extent of her most recent filings or to the preliminary pretrial conference scheduled at the beginning of November.

40. Ms. Tierney's aforementioned correspondence of October 30, 1998, made no reference to the Court's order of October 29, 1998, denying her motions filed on October 27, 1998, or (if unaware of said order) to the prospects of success of such motions.
41. The Court's order of October 29, 1998, effectively eliminated Mr. Carbone's case from the United States District Court (N.H.) docket. Ms. Tierney received the Court's order and she understood that Mr. Carbone's case no longer existed.
42. Ms. Tierney did not send a copy of the October 29 order to Mr. Carbone. Nor did she or her paralegal assistant, Kristin LaBarre otherwise timely or effectively apprise Mr. Carbone of the dismissal of his case.
43. On November 25, 1998, Ms. Tierney's paralegal assistant, Kristin LaBarre, wrote to Mr. Carbone to "update" him on his case. She indicated that once a process server was appointed, Mr. Carbone's amended complaint with revised damages claim would be served. Ms. LaBarre's letter makes no reference to the Court's prior orders dismissing the existing case.
44. On December 9, 1998, Ms. Tierney undertook to refile Mr. Carbone's complaint in the United States District Court in New Hampshire. She invoked diversity jurisdiction once again, but, this time, alleged that the amount in controversy exceeded \$75,000, exclusive of interest and costs, with a revised total claim of

\$77,000. Ms. Tierney also moved successfully for the appointment of a special process server.

45. On January 12, 1999, Ms. LaBarre wrote again to Mr. Carbone to “update” him on the case. She advised that the complaint had been successfully served on the defendants, that the Court would be issuing a notice of hearing, and that Ms. Tierney would schedule a meeting to prepare for the hearing.
46. On January 20, 1999, defendants filed a Motion to Dismiss the new, revised, complaint in the U.S. District Court in New Hampshire on grounds that there was no personal jurisdiction over the two Massachusetts defendants.
47. Ms. Tierney filed a timely objection to defendants’ January 20, 1999, Motion to Dismiss, along with a supporting memorandum of law.
48. In Ms. Tierney’s aforesaid memorandum of law, she addressed the issue of “minimum contacts” under New Hampshire’s Long Arm Statute. Ms. Tierney acknowledged that the case had previously been dismissed, but argued that the dismissal was without prejudice and that the new action was brought within the applicable statute of limitations.
49. Ms. Tierney’s objection to defendants’ Motion to Dismiss contained a request that the case be transferred to the United States District Court in Massachusetts if this Court ruled against her and found no personal jurisdiction in New Hampshire.
50. Ms. Tierney forwarded copies of the new, revised, complaint and the recent pleadings addressing the question of dismissal to Mr. Carbone on March 31, 1999, along with her bill for out-of-pocket expenses.

51. On April 5, 1999, the Court ruled that defendants' Motion to Dismiss was "moot in light of my determination that the court lacks subject matter jurisdiction over plaintiff's claim."
52. The Court issued an order on April 7, 1999, as follows: "plaintiff had a full and fair opportunity to litigate the jurisdictional issue in the former action. He chose not to appeal the District Court's adverse ruling in that action. He cannot avoid the effect of that ruling simply by filing a new action." The Court made clear that "although a dismissal for lack of subject matter jurisdiction does not operate as an adjudication of the merits [citation omitted], it conclusively resolves the jurisdictional issue decided by this court [citations omitted]." The Court dismissed the case "without prejudice to plaintiff's right to reinstate his claim in a state court of competent jurisdiction."
53. Judgment for the defendants in United States District Court in New Hampshire was entered on April 8, 1999.
54. Copies of the Court's aforesaid ruling and orders of April 5, 7, and 8, 1999, were sent to Ms. Tierney.
55. Copies of the April 5 and 7 orders were received by Ms. Tierney's office on April 8, 1999. The April 8, 1999, order of judgment was received by Ms. Tierney's office on or before April 13, 1999.
56. On April 9, 1999, Ms. Tierney wrote to Mr. Carbone. She told him that she had received "notice" from the United States District Court in New Hampshire "indicating they believe the lawsuit should be brought in the United States District

Court for the District of Massachusetts. . . .” She also stated her presumption that “the Court believes if we are successful in the litigation, you would have an easier time collecting from your son if the Order issued from a Massachusetts based court.” Ms. Tierney sought Mr. Carbone’s authority to file the complaint in Massachusetts. She described the process as “in essence a transfer from one United States District Court to another. . . .”

57. Ms. Tierney’s letter of April 9, 1999, makes no reference to any of the aforementioned recent court orders or to the enclosure of any copies thereof.
58. While Ms. Tierney’s file copy of the order of April 5, 1999, contains the notation, “cc client”, there is no other record of supplying Mr. Carbone with copies of the Court’s orders of April 5, 7, and 8, 1999, and Mr. Carbone denies receiving them.
59. On April 30, 1999, Ms. Tierney filed Mr. Carbone’s complaint (dated April 28, 1999) in the United States District Court for the District of Massachusetts, followed by a return of service dated May 10, 1999. Ms. Tierney contemplated moving the Court to waive the filing fee and to treat the matter as a transfer case from the United States District Court in New Hampshire. Ms. Tierney did not file such a motion. At the time of filing the complaint, Ms. Tierney identified the case as an “original proceeding.”
60. On May 25, 1999, the defendants filed a Motion to Dismiss in the United States District Court in Massachusetts, raising again the issue of subject matter jurisdiction and asserting that the order of the United States District Court for the District of New Hampshire was dispositive. Counsel attached to his motion

copies of the complaints filed in New Hampshire, the defendants' motions to dismiss, and the Court's ruling and orders of April 5, 7, and 8, 1999.

61. Ms. Tierney filed an Objection to plaintiffs' Motion to Dismiss and a supporting memorandum of law on June 7, 1999.
62. In her Objection, Ms. Tierney represented that "this matter has not been adjudicated but, rather, the Honorable United States Court for the District of New Hampshire has declined jurisdiction believing that the matter should, instead, be adjudicated by the Honorable United States District Court for the District of Massachusetts."
63. In her Objection, as aforesaid, Ms. Tierney mischaracterized the import or intention of the United States District Court's (NH) orders on the jurisdictional issue.
64. There was no suggestion by the United States District Court (NH) in its orders of April 5 and 7, 1999, that it intended, in effect, for jurisdictional reasons, to defer to the court in Massachusetts. Rather, the Court made clear that while its dismissal for lack of subject matter jurisdiction "does not operate as an adjudication of the merits, [citations omitted], it conclusively resolves the jurisdictional issue decided by the court [citations omitted]." In other words, Mr. Carbone's case does not fall within the diversity jurisdiction of any federal court.
65. In her supporting memorandum of law, Ms. Tierney, acknowledged that the initial complaint filed in New Hampshire had not alleged damages sufficient to satisfy jurisdictional limits, but argued that the complaint and Mr. Carbone's motion to

vacate the court's order of dismissal had been "withdrawn without prejudice," and that a second "action" had been filed in New Hampshire correctly delineating the damages assessed.

66. Contrary to Ms. Tierney's assertion, the initial complaint and motion to vacate filed in federal court in New Hampshire had not been "withdrawn without prejudice." In fact, the Court had "rejected Plaintiff's attempt to vacate the judgment and amend the complaint to cure the jurisdictional defect." It issued an adverse ruling (albeit without prejudice to a filing in state court), to which Ms. Tierney had not taken an appeal.
67. Ms. Tierney's various arguments and representations to the United States District Court in Massachusetts in her aforesaid Objection and memorandum were not soundly based on the record or the law of the case.
68. Following a temporary stay of proceedings due to Lisa Carbone's filing in bankruptcy and related proceedings described below, the United States District Court in Massachusetts issued a scheduling order on January 27, 2000, setting the matter for hearing on February 2, 2000.
69. Following notice from the Court that Mr. Carbone had appeared personally to inquire as to the status of his case, Ms. Tierney wrote to Mr. Carbone on January 31, 2000. Ms. Tierney assured Mr. Carbone that the matter was being handled as expeditiously as possible, that the hearing was being rescheduled due to scheduling conflicts, and that the Court might soon issue a ruling based on the

documents already on file. Ms. Tierney also offered to withdraw as counsel if Mr. Carbone so directed.

70. On February 9, 2000, the United States District Court for the District of Massachusetts issued an order granting the defendants' Motion to Dismiss on jurisdictional grounds, citing the earlier adverse ruling in the United States District Court in New Hampshire. Further, the Court ruled that Plaintiff's claim was "dismissed without prejudice to its prosecution in state court."
71. While the proceedings in the United States District Court in Massachusetts were still pending, Ms. Tierney filed a complaint on behalf of Mr. Carbone against Daniel and Lisa Carbone in the Essex County, Massachusetts Superior Court, on July 1, 1999.
72. Defendants promptly filed a Motion to Dismiss the Essex County Superior Court case and sought sanctions, citing the pendency of the same matter in the United States District Court in Massachusetts that had earlier been dismissed in New Hampshire.
73. On July 12, 1999, Ms. Tierney filed an objection to the Motion to Dismiss, arguing, in part, that her client was proceeding in state court in response to an order of the United States District Court in New Hampshire dismissing the case "without prejudice to plaintiff's right to reinstate his claim in a state court of competent jurisdiction."
74. On July 14, 1999, Ms. LaBarre wrote to Mr. Carbone, advising that his complaint had been "forwarded" to the Essex County Superior Court. She made no

reference to the aforementioned Motion to Dismiss in Essex County Superior Court or to Ms. Tierney's objection thereto.

75. On August 4, 1999, the Essex County Superior Court denied the defendants' Motion to Dismiss, but stayed the proceeding pending resolution of the jurisdictional issue pending in the United States District Court in Massachusetts.
76. In response to a call from Mr. Carbone to Ms. Tierney's office, Ms. LaBarre faxed Mr. Carbone a letter dated August 12, 1999, attaching a copy of the aforesaid Essex County Superior Court's ruling on the Motion to Dismiss. She encouraged Mr. Carbone to call with questions.
77. In May 1999, while Mr. Carbone's case was still pending in United States District Court, Lisa Carbone filed a Motion to Dismiss and Suggestion of Bankruptcy, a copy of which was sent to Ms. Tierney.
78. On June 3, 1999, Ms. LaBarre wrote to Mr. Carbone about the bankruptcy proceeding. She commented on Lisa Carbone's legal position in that process. She also reassured Mr. Carbone that Ms. Tierney was in touch with the Trustee in Bankruptcy; that she would be contacting Lisa's attorney; that Ms. Tierney would request a deposition of Lisa; that there would be a chance to appeal a court finding favorable to Lisa; and that Mr. Carbone's case in federal court could proceed through Defendant Daniel Carbone.
79. Ms. Tierney agreed to represent Mr. Carbone in pursuit of his claim against Lisa Carbone in the bankruptcy proceeding.

80. In connection with bankruptcy proceeding, Ms. Tierney planned to contest Lisa's use of the homestead exemption and to oppose discharge of Lisa's debt to Mr. Carbone; she communicated with the Trustee in Bankruptcy regarding the first meeting of creditors and later filed an appearance on behalf of Mr. Carbone.
81. The bankruptcy filing and related proceedings temporarily stayed the proceedings in United States District Court in Massachusetts, as a matter of law, until January 2000. It also barred initiation of new claims against Lisa Carbone in any other courts.
82. Knowing that Lisa Carbone had filed for bankruptcy and, in spite of the automatic statutory stay, Ms. Tierney delayed dropping Lisa Carbone as a defendant in the United States District Court case and went forward with the new case in Essex County Superior Court.
83. Pursuant to the Notice of Chapter 7 Bankruptcy, Meeting of Creditors & Deadlines issued May 14, 1999, Ms. Tierney was required to file Mr. Carbone's Complaint Objection to Discharge of the Debtor (Lisa Carbone) on or before August 9, 1999. An Objection to any exemptions claimed by Ms. Carbone was due 30 days after the conclusion of the meeting of creditors scheduled for June 8, 1999.
84. Ms. Tierney did not file the aforementioned pleadings in the bankruptcy proceeding, nor did she communicate with Mr. Carbone concerning her determination, if any, not to file such pleadings.
85. Lisa Carbone was discharged in bankruptcy on August 18, 1999.

86. Ms. Tierney did not pursue prejudgment attachment of Lisa's real property in connection with any of the aforementioned civil proceedings, so as to secure judgment and possibly to avoid a discharge in bankruptcy.
87. Following a formal notice by letter of August 9, 1999, Lisa Carbone's bankruptcy counsel filed a Motion for Sanctions on August 23, 1999, in United States Bankruptcy Court against Mr. Carbone and Ms. Tierney for having maintained an action in the United States District Court for the District of Massachusetts and for having proceeded with a new action in Essex County Superior Court in violation of the automatic stay.
88. On September 22, 1999, Ms. Tierney filed a Motion to Amend Pleadings in the United States District Court to delete any reference to Lisa Carbone as a Defendant in the pending United States District Court matter.
89. As an objection to Mr. Carbone's motion for sanctions related to Respondent's violation of the automatic stay, On October 12, 1999, Ms. Tierney filed a "Motion to Dismiss," requesting that the U.S. Bankruptcy Court dismiss Lisa Carbone's Petition in Bankruptcy. In that same pleading, Ms. Tierney represented that she had filed the necessary documents to release Lisa Carbone as a defendant in the United States District Court matter.
90. On November 9, 1999, the U.S. Bankruptcy Court denied Ms. Tierney's aforesaid Motion to Dismiss and granted the Motion for Sanctions against Ms. Tierney.
91. By letter of February 23, 2000, Ms. Tierney wrote to the Essex County Superior Court, advising it as to the status of the various proceedings and asking that the

case be brought forward. The Essex County Superior Court issued a "Notice of Status Review of the Docket," dated March 14, 2000, requiring a response from the parties. According to the Notice, absent a response from the plaintiff within 20 days, "a dismissal will enter and the docket closed out."

92. Upon receipt of the March 14, 2000, Notice, Ms. Tierney contacted the Superior Court to inquire whether it had received her letter of February 23 providing information about the status of the matter. Ms. Tierney was advised that the Court had not received her prior correspondence.
93. Ms. Tierney followed-up with a letter dated March 16, 2000, sent to the Essex County Superior Court via Federal Express. Ms. Tierney included the completed Notice of Status Review form, another copy of her February 23 letter, and copies of the orders of dismissal issued by the United States District Courts in New Hampshire and in Massachusetts. Federal Express records confirm receipt of Ms. Tierney's letter by the Essex County Superior Court on March 17, 2000.
94. The Essex County Superior Court issued an "Order of Dismissal" dated April 26, 2000, providing that, upon consideration of the action, "it is ORDERED AND ADJUDGED that the action be and hereby is dismissed." Ms. Tierney received a copy of the order.
95. The aforementioned Essex County Superior Court order contained no specific finding or explanation of the basis for dismissal, nor was Ms. Tierney aware of any basis for the Court's action.

96. Ms. Tierney determined that the aforementioned Essex County Superior Court's order represented a final ruling on the merits.
97. Ms. Tierney did not file any additional pleadings to question or challenge the basis for the Essex County Superior Court order.
98. Essex County Superior Court records at the time contained a notation on the March 14, 2000, Notice of Status Review form issued in the Carbone case, as follows: "No response."
99. The Essex County Superior Court records, including a docket sheet pertaining to Mr. Carbone's case, were open to the public and available for inspection by Ms. Tierney. Neither Ms. Tierney, nor Ms. LaBarre undertook such an inspection.
100. Upon receipt of the order of dismissal from the Essex County Superior Court, Ms. Tierney sent Mr. Carbone a letter dated May 4, 2000. Ms. Tierney summarized the procedural history of Mr. Carbone's case, noting that the United States District Court in New Hampshire had "declined jurisdiction," that the United States District Court in Massachusetts had dismissed the case, and that the Essex County Superior Court had followed suit.
101. In her letter of May 4, 2000, Ms. Tierney advised Mr. Carbone that, while he could appeal the Superior Court's order to the Massachusetts Supreme Judicial Court, such action would be costly and fruitless. She offered no analysis of the "jurisdictional issue" addressed by the federal courts, including the question whether the federal court orders of dismissal (issued "without prejudice" to pursuit of a claim in state court) could properly have served as the basis for

dismissal of Mr. Carbone's claim in state court. Ms. Tierney concluded only that "every court which could have heard the matter has quashed all attempts for the case to be heard." Ms. Tierney offered to transfer the file to another attorney if Mr. Carbone so desired.

102. The attorney/client relationship ended in May 2000.
103. During the course of the representation, Mr. Carbone often met with Ms. Tierney, seeking explanations as to what was happening in his case and complaining about the delays encountered in disposing of the matter. Many of these meetings occurred without appointment when Mr. Carbone appeared at Ms. Tierney's office and insisted on seeing her.
104. On or about September 17, 1999, Ms. Tierney and Ms. LaBarre had a scheduled meeting with Mr. Carbone at a diner in Concord to discuss the case. Mr. Carbone was upset and unable to understand what Ms. Tierney and Ms. LaBarre were telling him regarding their inability to proceed in any court against Lisa Carbone and regarding the time it was taking to recover on his claims.
105. Throughout the representation, Mr. Carbone had considerable difficulty hearing and understanding Ms. Tierney's explanations and asked Ms. Tierney to communicate with him in writing.
106. Ms. Tierney did not consistently communicate with Mr. Carbone in writing and many of her written communications were incomplete or inaccurate.

## II. RULINGS OF LAW

The Committee voted to make the following rulings of law, by clear and convincing evidence, that Respondent violated the following Rules of Professional Conduct: Rule 1.1(a-c): Competence; Rule 1.3(a-b): Diligence; Rule 1.4(a-c): Communication, and Rule 8.4(a): Misconduct. The Committee accepted the parties' recommended dismissal of a violation of N.H. Rule Prof. Conduct 8.4(c): Deceit, based on a failure to prove by clear and convincing evidence.

## III. ANALYSIS

The Committee found that the Respondent's misconduct was severe. She was grossly negligent in her representation of Mr. Carbone. She failed to refer to the current *Federal Rules of Civil Procedure*, lacked familiarity with the procedure and documents associated with the federal court practice, and failed to seek the counsel of another more experienced attorney to ensure that she understood the current law. Nor did she demonstrate an awareness of the substantial harm that her lack of experience in certain areas could bring to her client.

Respondent was also grossly negligent in her communications with her client. She failed to forward copies of important documents to Mr. Carbone, or otherwise communicate with him in writing, despite his request due to his severe hearing impairment. There was little or no recording of dates and times of transmission of information, and information that was provided was often inaccurate or incomplete.

The Committee agreed with Assistant Disciplinary Counsel that Mr. Carbone was deprived of any reasonable opportunity to pursue his claim and recover his financial losses. Mr. Carbone was not kept properly informed about the status of the underlying matter, and was also misled by Respondent's mischaracterizations of the facts on the status of his case.

The Committee further found that the Respondent was seriously lacking in promptness and diligence by failing to file timely objections and pleadings in compliance with federal rules and by failing to pursue other appropriate remedies in civil proceedings to the detriment of her client.

In considering mitigating factors the Committee took into account the many letters of support for the respondent and for the services provided by her to other clients. The Committee was also mindful of the Respondent's current client base and of the impact certain sanctions would have on them. The Committee found the Respondent's personal and emotional challenges at the time deserving of mitigating consideration.

With respect to aggravating factors, the Committee found Respondent's prior disciplinary history considerable. The many concerns about her ability to communicate effectively with her clients and to attend to routine details in her practice demonstrated a disturbing pattern. Another aggravating factor was the extent of the Respondent's experience as a practicing attorney since 1986. Finally, the Committee found especially troubling the Respondent's unwillingness to accept full responsibility for her actions.

#### **IV. SANCTION**

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 Committee endeavored to arrive at a sanction which would accomplish these ends, recognizing also that "(t)he sanction must take into account the severity of the misconduct." *Id.*

Although New Hampshire has not adopted the *American Bar Association's Standards for*

*Imposing Lawyer Sanctions* (2005) (*Standards*), the Committee looks to them for guidance. *See, e.g., Shillen's Case*, 149 N.H. 132, 139 (2003) (noting that although the Court has never formally adopted the *Standards* the Court has considered them when imposing sanctions). The *Standards* list the following factors to be considered in imposing sanctions: (a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. *Standards, supra* § 3.0; *Coffey's Case*, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). In applying these factors the Committee first categorizes the respondent's misconduct, then identifies the appropriate sanction. *Coddington's Case*, 155 N.H. 66, 71 (2007). The Committee then considers the effect of any aggravating or mitigating factors on the ultimate sanction. *Id.*

The Committee agrees with Assistant Disciplinary Counsel that the baseline sanction in this case is suspension. Respondent had considerable experience as an attorney yet failed to recognize a lack of competence in federal court matters, failed to seek assistance from an attorney with the appropriate expertise, failed to communicate effectively or accurately with her client, failed to protect her client's interests, and subsequently deprived her client of any reasonable opportunity to pursue his claim or recover his financial losses.

When the aggravating factors of the Respondent's pattern of behavior and inability or unwillingness to acknowledge her misconduct are considered, a suspension of at least a year to protect the public and preserve the integrity of the legal profession appears reasonable. However, when the mitigating factors of the Respondent's client support and emotional state of mind at the time are taken into account, alternatives emerge. In addition, the Committee recognizes the Respondent's apparent need, as a sole practitioner, for assistance in certain aspects of practice.

Considering all these factors, the Committee believes a suspended suspension involving a lengthy period of mentoring may better protect the public, including current clients, and prevent similar conduct in the future while preserving the integrity of the profession.

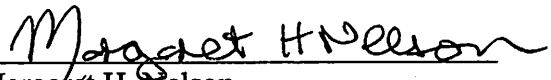
Having made the above findings and rulings, the Committee concludes that the appropriate discipline in this matter is a recommendation for a one year suspension, suspended for two years. The Committee further recommends that Respondent arrange for a mentor, at her own expense, to be approved by Assistant Disciplinary Counsel. The role of the mentor will be to assist respondent with office practices and the effective, prompt and accurate communication with clients. Respondent shall be assessed all costs associated with the investigation and prosecution of this matter.

## V. CONCLUSION

For the above reasons the Professional Conduct Committee recommends to the New Hampshire Supreme Court that Nancy S. Tierney be suspended from the practice of law for one year, suspended for two years, for violating N.H. R. Prof. Conduct 1.1(a-c): Competence; 1.3(a-b): Diligence; 1.4(a-c): Communication, and 8.4(a): Misconduct, and other conditions noted above.

Therefore, the Committee directs Assistant Disciplinary Counsel to file a Petition for the suspension of Nancy S. Tierney in the New Hampshire Supreme Court as provided in this Order.

March 12, 2009

  
Margaret H. Nelson  
Chair

### Distribution:

James L. Kruse, Assistant Disciplinary Counsel  
Russell F. Hilliard, Esquire

**File**

New Hampshire Supreme Court  
**Professional Conduct Committee**

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Benette Pizzimenti, Vice Chair  
Toni M. Gray,\* Vice Chair  
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*Tierney, Nancy advs. Attorney Discipline Office # 04-060*

**ORDER ON MOTION FOR CLARIFICATION AND RECONSIDERATION  
AND RESPONSE**

On June 16, 2009, the Professional Conduct Committee deliberated Assistant Disciplinary Counsel's Motion for clarification and Reconsideration, Respondent's Response to Motion for Clarification and Reconsideration, Assistant Disciplinary Counsel's Proposed Conditions for Mentoring, and Respondent's Proposed Conditions for Mentoring. Members present included: Margaret H. Nelson, Susan R. Chollet, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling and James R. Martin. Members recused were: Benette Pizzimenti, Toni M. Gray, David N. Cole, Thomas P. Connair, and Marilyn Billings McNamara. Gretchen Rule Hamel was absent.

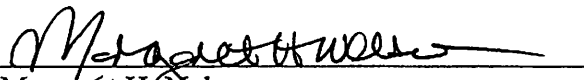
Upon consideration, the Committee voted to affirm the March 12, 2009, recommendation for a one year suspension, suspended for two years with conditions. The recommended conditions include:

1. Ms. Tierney shall arrange, at her own expense, to have an attorney who is an active member of the New Hampshire Bar serve as a law practice mentor for a period of two years. The choice of mentor shall be subject to the approval of the Attorney Discipline Office (ADO). Ms. Tierney's mentor shall execute a mentoring agreement, confirming the mentor's agreement to perform the services described in the mentoring order.

2. Ms. Tierney shall meet with the mentor in person at least once each month during the first year to discuss matters relating to Ms. Tierney's practice, with particular focus on her compliance with the conditions set forth herein, as well as the existence of and Ms. Tierney's response to any client complaints or claims against her. The meetings shall occur quarterly in the second year.
3. The mentor will be expected to make recommendations directed at improving the management of Ms. Tierney's practice, particularly as it relates to litigation matters. Ms. Tierney shall promptly implement any reasonable recommendations made by the mentor in this regard.
4. The mentor will have access to Ms. Tierney's client files, and will be expected to be available at any reasonable time to discuss with the ADO Ms. Tierney's practice and performance under this mentoring order. Ms. Tierney shall execute a release permitting the mentor to discuss with the ADO any matter relating to Ms. Tierney's practice and her fitness to practice law. The mentor's report shall not identify client names in the first instance to preserve client confidentiality. The mentor shall review with Ms. Tierney all matters in the office to assure compliance with court rules, timely filing of pleadings and appropriateness of accepting cases.
5. The mentor shall file quarterly reports with the ADO addressing a) Ms. Tierney's compliance with the conditions set forth herein; b) the existence of and Ms. Tierney's response to any client complaints or claims; and c) any issues or concerns the mentor may have about the course and condition of Ms. Tierney's practice, including Ms. Tierney's personal well-being and fitness to practice law. The mentor will also be expected to file a final report at the end of the period of this mentoring order with an assessment of Ms. Tierney's performance under the terms of the mentoring order and her fitness to continue her practice.
6. Ms. Tierney shall promptly supply her clients with copies of all correspondence, pleadings, discovery requests and materials sent and received by Ms. Tierney, as well as all correspondence, notices and orders issued by the Court.
7. Ms. Tierney shall provide her clients with timely updates which accurately describe the current status of their case.

8. In the event the ADO receives a complaint against Ms. Tierney during the period of the mentoring order that arises out of events that occurred following the date of the order, the complaint shall be processed by the ADO on an expedited basis. In such case, the term of the mentoring order shall be extended pending the investigation and disposition of any charge associated with such complaint. Any final adjudication of a violation of the Rules of Professional Conduct arising out of such complaint shall provide the basis for a request by the ADO to impose any period of suspension that has been stayed on condition of Ms. Tierney's compliance with the mentoring order. In the event of such a request, Ms. Tierney shall be entitled to an evidentiary hearing and review by the Committee.
9. Ms. Tierney's failure to comply with any of the provisions of the mentoring order shall also constitute grounds for the ADO to file a report to the Committee and to request a show cause hearing on the alleged violation. At any such show cause hearing, Ms. Tierney shall have the burden of showing by a preponderance of the evidence why she should not be suspended. The Committee shall have the power to refer the matter to the New Hampshire Supreme Court with recommendations regarding sanction.
10. Nothing in this agreement limits the ADO's ability to take any action that it otherwise deems necessary under Rules 37 and 37A.
11. Ms. Tierney shall be solely responsible for all costs incurred in connection with the implementation and enforcement of the mentoring order.

September 9, 2009

  
Margaret H. Nelson  
Chair

Distribution:

James L. Kruse, Assistant Disciplinary Counsel  
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