

New Hampshire Supreme Court

Professional Conduct Committee

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Werme, Paula J. advs. Attorney Discipline Office # 07-017

SIX MONTH SUSPENSION – STAYED FOR TWO YEARS

On January 29, 2009, the Professional Conduct Committee heard Oral Argument in the above-referenced matter. Landya B. McCafferty, Disciplinary Counsel, appeared for the Attorney Discipline Office. Paula J. Werme, Esquire, appeared *pro se*.

Members present included: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, James R. Martin, and Marilyn Billings McNamara. Susan R. Chollet and Gretchen Rule Hamel were absent.

The Committee reviewed the Record, including: the Notice of Charges; Stipulation of Facts and Rules, Protective Order, Motion for Protective Order, Paula J. Werme's Disciplinary Record – Exhibit A, Email submission from Respondent-Exhibit 1, Transcript of Sanction Hearing September 23, 2008 and Hearing Panel Report and Recommendation dated October 2, 2008.

I. FACTUAL FINDINGS

The Committee voted to accept the Stipulation of Facts dated June 16, 2008, which establishes those facts by clear and convincing evidence. The Stipulation provides as follows:

1. Ms. Werme is an attorney licensed to practice law in New Hampshire. Ms. Werme was admitted to practice on October 28, 1996. At all times material to this proceeding, Ms. Werme operated her law office at 83 North Main Street, Boscawen, New Hampshire 03303.
2. On February 10, 2005, by order of Milford District Court (Crocker, J.), E.S. (d.o.b.5/2/90) was removed from the physical care of her mother due to an emergency situation created the mother's extreme abuse of alcohol.¹
3. Following a hearing, on March 10, 2005, the Court found E.S. to be a neglected child due to the mother's inability to meet the emotional and physical needs of E.S. as a result of the mother's chronic alcohol abuse.
4. In March 2005, the DCYF requested that its Pennsylvania counterpart conduct a home study on E.S.'s father to determine the appropriateness of placing E.S. with him.²
5. In May 2005, the father appeared to have orchestrated E.S.'s removal from the State of New Hampshire, without authorization, to reside with him in Pennsylvania. After approximately one month, E.S. was returned to New Hampshire from Pennsylvania.
6. The Court held a hearing pursuant to In re: Bill F., 145 N.H. 267 (2000), and by order dated August 24, 2005, found the father was not a fit parent.³
7. The father was represented at that time by Linda J. Argenti, Esquire.
8. E.S. continued living in placement.
9. On or about September 9, 2005, Ms. Werme filed an Appearance on behalf of the father.
10. On or about September 14, 2005, DCYF requested a "no contact" order between E.S. and the father.
11. DCYF included the following in its motion for a "no contact" order:

1 This footnote and subsequent footnotes are provided by way of explanation and clarification of the Committee's factual findings. The order of the Milford District Court was involved a proceeding pursuant to RSA 169-C, the Child Protection Act.

2 "DCYF" refers to the New Hampshire Division of Child, Youth and Family Services which initiates abuse and neglect petitions.

3 The cited case was an appeal by the father of Bill F. The father was not charged with abuse or neglect. The Supreme Court held that parents not charged with abuse and neglect are entitled to a full hearing in the court regarding their ability to obtain custody and whether the uncharged parent is unfit to perform his or her parenting duties.

1. [E.S.] is in the legal custody of DCYF and placed with relatives.
2. On August 24, 2005, September 1, 2005 and September 7, 2005 [E.S.] has received phone calls from her father that have greatly upset her.
3. [The father] has called [E.S.], on the cell phone he provides for her, and these calls have quickly deteriorated to shouting matches between [the father] and [E.S.].
4. [E.S.] reported that [the father] has told her that he is preparing to sue the relatives she is currently placed with.
5. After the last phone conversation with [the father], [E.S.] stated that she “wants the harassment to stop.”
6. [E.S.] is currently having medical problems that may be caused by the stress, but are definitely being exacerbated by the stress, caused by these phone calls.
7. Although in the past [E.S.] has stated that she wanted to live with her father, she is now quite content with her placement and does not want it disturbed.
8. On the evening of September 7, 2005 [E.S.] received a call on her cell phone from a woman identifying herself only as an attorney, and was told that DCYF was not looking out for [E.S.’s] best interest but that the caller would.
9. This phone call also caused enormous stress for [E.S.].
10. Laurie Bruno, CASA/GAL, has been contacted and assents to this Motion.⁴

WHEREFORE the Division requests this Court:

- A. Prohibit any direct or indirect unsupervised contact between [the father] and [E.S.].

⁴ “CASA”, refers to Court Appointed Special Advocates, and “GAL” is Guardian *Ad Litem*. CASA volunteers represent the interests of children who are involved in abuse and neglect proceedings.

B. Define “supervised” as observed by a professional approved by DCYF; and

C. Grant such other relief as is deemed just.

12. Ms. Werme objected to the requested “no contact” order.
13. On September 19 and 28, 2005, hearings were held in Milford District Court (Crocker, J.) on DCYF’s motion, as well as several other issues.
14. On October 7, 2005, the Court issued an order entitled, “Hearing on Motions,” which Order was dated October 6, 2005.
15. In that Order, the Court held, in relevant part, as follows:

The court grants, on a temporary basis, DCYF’s request for protective orders. The court, upon offers of proof, finds that [E.S.] currently has a medical condition which may be exacerbated by stress. At this time she wishes to have no contact with her father, as those conversations of late have been heated and stressful for her.

Until her medical condition is under control, the court hereby orders that neither [the father], members of his family, or his attorney are to have any unauthorized contact with [E.S.].

Absent a further order of the court, contact may be authorized by DCYF in conjunction with CASA.

The court will revisit this order when [E.S.’s] medical condition has stabilized and the court can get some direct input from [E.S.].

All prior orders, not inconsistent with the above, remain in full force and effect.

16. Following that Order, the Court determined that E.S.’ mother continued to consume alcohol, and the Court determined it unlikely that E.S. would be returned to her mother’s care.
17. Due to the prior removal of E.S. out-of-state and the emotional pressure that the Court determined the father had placed on E.S., the Court determined it unlikely that E.S. would be returned to the father’s care.

18. Due to the unlikelihood of parental reunification, DCYF began to pursue a guardianship for E.S.⁵
19. While a guardianship hearing was pending, Ms. Werme wrote a letter dated January 25, 2007, to E.S. In the letter, Ms. Werme wrote:

Dear [E.S.]:

It appears to me from information I now have that apparently [E.S.'s relatives] have told you that "if only your father would pay his past due child support, there would be plenty of money for your [sic] to go to college."

Unfortunately this is not true. Your father owes the money to the state of New Hampshire. If he were to win Megabucks and be able to pay every nickel of past due child support, you would not see any of it unless there was money left over after payment of his past due child support. All he [sic] to offer you is his love, which I think you know has always been there. I feel very badly that you have been told otherwise by DCYF or anyone else.

You must attend the guardianship hearing as per statute. I will ask that it be dismissed if you do not attend. You will hear everything I have to say is correct there.

Sincerely,

Paula J. Werme

cc. the father
the mother

20. Ms. Werme did not seek the approval of the Court, DCYF, or CASA prior to sending the January 25, 2007, letter to E.S.
21. E.S. received Ms. Werme's January 25 letter and showed it to a CASA representative.
1. At the time that E.S. received Ms. Werme's January 25, 2007, letter, the October 6, 2005, "no contact" Order was still in effect.

⁵ Jurisdiction over the guardianship of a minor would have been in the Probate Court for Hillsborough County pursuant to RSA 463:4.

II. RULINGS OF LAW

Based on the Stipulation of Facts, the Stipulation As To Rules Violated, and the record in this case, the Professional Conduct Committee voted to find by clear and convincing evidence that Ms. Werme violated the following Rules of Professional Conduct: Rule 3.4(c): Knowingly Disobey Court Order, and Rule 8.4(a): General Rule.

The Stipulation provides as follows:

1. Prior to sending the January 25, 2007 letter to E.S., Ms. Werme did not seek authorization from the Court, DCYF, or CASA.
2. At the time that Ms. Werme made contact with E.S. via Ms. Werme's January 25, 2007 letter to E.S., there was an October 6, 2005 Court Order in effect that prohibited Ms. Werme from having unauthorized contact with E.S.
3. Ms. Werme was aware of the October 6, 2005 Court Order.
4. By forwarding to E.S. the January 25, 2007 letter, Ms. Werme knowingly violated the Court's October 6, 2005 "no contact" Order.
5. Ms. Werme's conduct in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.4(c).

III. SANCTION

Having made the above findings and rulings, and for the reasons stated below, the Professional Conduct Committee concludes that the appropriate discipline in this matter is a six (6) month suspension with the suspension being stayed for a period of two (2) years. 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). Disciplinary action and sanctions are not intended as a mode of inflicting punishment. *Kersey's Case*, 150 N.H. 585, 585 (2004). Rather, 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.*

The New Hampshire Supreme Court and this Committee look to the American Bar Association’s *Standards for Imposing Lawyer Sanctions* (1992) (“*Standards*”) for guidance to determine the baseline sanction. *Coffey’s Case*, 152 N.H. at 513; *see also, 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). The *Standards* set forth four factors to consider in imposing sanctions: “(a) duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Standards* Sec. 3.0; *Coffey’s Case*, 152 N.H. at 513. The *Standards* are useful as guidelines but their application is not mandatory.

The relevant ABA *Standard* for Ms. Werme’s violation is 6.2 which is entitled “Abuse of Legal Process”. This *Standard* includes the “failure to obey any obligation under the Rules of the Tribunal except for an open refusal based on an assertion that no valid obligation exists.”

Standards, Sec. 6.2 provides:

- 6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.
- 6.22 Suspension is appropriate when a lawyer knows that he is violating a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.
- 6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other

party, or causes interference or potential interference with a legal proceeding.⁶

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and cause little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.⁷

The Committee identified the baseline sanction as a suspension using *Standard 6.22*.

Applying the factors in the *Standards*, the Committee concludes as follows:

1. The duty violated was one owed to the court and the judicial process, embodied in Rule 3.4(c) of the Rules of Professional Conduct.
2. Ms. Werme knew or should have known that by communicating with [E.S.] she was in violation of the Court's unambiguous Order.
3. The violation of Rule 3.4(c), an expressly prohibited direct communication with a minor child involved in an abuse and neglect proceeding and a guardianship proceeding, was the cause of injury or potential injury to the child and could have caused potential injury to the child and could have caused potential injury to the legal proceedings.

The Committee recognizes that there is disagreement regarding whether Ms. Werme's conduct was intentional and/or knowing. Disciplinary Counsel contends that the parties' stipulation did not support the Hearing Panel's conclusion of "intentional and at least grossly reckless conduct." The Committee is well aware of Ms. Werme's prior disciplinary record. The conduct in this case differs from the intentional acts in the prior matter for which Ms. Werme received a reprimand. In *Werme's Case*, 150 N.H. 351 (2003), the Court found that Ms. Werme counseled her client to provide confidential court records to a newspaper in violation of statute,

⁶ Section 6.23 uses the term "reprimand". The most analogous sanction in New Hampshire is a public censure.

⁷ Section 6.24 uses the term "admonition". The most analogous sanction in New Hampshire is a reprimand.

RSA 169-C:25. According to the plain language of Rule 1.2(d), Ms. Werme violated Rule 1.2(d) upon counseling her client to violate the statute. Ms. Werme argued that that the statute was unconstitutional which empowered her to advise her client to disobey it. The Court disagreed. In that case, her actions were clearly intentional. However, in this matter there is no evidence that Ms. Werme set out to violate the Court Order. Further, rather than arguing that her conduct was justified, she acknowledges her mistake, and as Disciplinary Counsel characterizes it, is remorseful.

In assessing the aggravating and mitigating factors, the Committee reviewed *Standard* § 9.0. Focusing first on the aggravating factors, there are three. Ms. Werme has a prior disciplinary history involving similar circumstances. The record includes a Reprimand and a Warning. *See, Standards* § 9.22(a) and (c). The case involved a minor child, in a vulnerable position in life and in the legal system, and for whose protection the “no contact” Order was issued by the Milford District Court.

There are several mitigating factors: absence of a dishonest or selfish motive, cooperative attitude toward the proceeding and Disciplinary Counsel and remorse. *See, Standards* § 9.32 (b), (e), and (l).

The Hearing Panel recommended that Ms. Werme be suspended from the practice of law for a period of three (3) months and that she be ordered to complete a course of Continuing Legal Education (“CLE”) satisfactory to and approved by the Professional Conduct Committee aimed at the practice and ethics of dealing with parties, counsel and third parties, including minor children in abuse and neglect and guardianship cases before she is permitted to resume the practice of law. The Panel’s decision was based in part on a finding and conclusion that Ms.

Werme's mental state was "intentional" and at least "grossly reckless" under the circumstances.

Disciplinary Counsel recommends a public censure and contends that there is no evidence in the record that Ms. Werme intentionally violated the "no contact" Order issued by the Milford District Court in October 2005. She takes issue with the Panel's factual finding regarding an intentional and at least grossly reckless violation of Rule 3.4(c).

Ms. Werme is a sole practitioner who operates out of an office in Boscawen, New Hampshire. She has focused her practice on defending both charged and uncharged parents in abuse and neglect cases involving the Child Protection Act, RSA 169-C. The underlying proceeding in this matter involved representation of a non-charged father. She also represents clients involved in factually complicated or medically complicated cases of a similar nature. These cases are not money makers; rather Ms. Werme winds up putting in more *pro bono* hours than time for which she receives payment. (Hearing Panel Transcript, September 23, 2008, at 20:22-21:2). Ms. Werme is a zealous advocate for her clients and committed to their causes. However, her commitment to defending non-charged parents caught up in abuse and neglect proceedings may cloud her judgment. Ms. Werme acknowledged at the oral argument that she has some difficulty balancing her vigorous advocacy for her clients and the application of the Rules. She admits that she did cross the line by violating the Court Order and was very sorry. She accepts that the line cannot be "crossed" and that she cannot even come close to the line. Disciplinary Counsel was clearly impressed by Ms. Werme's acceptance of responsibility and her remorsefulness.

Ms. Werme expressed concern that it is unlikely that she could complete the requirement due to the lack of availability of such programs or courses. Without information that such CLEs

would be available to Ms. Werme within a reasonable period of time, if at all, the Committee declines to impose this aspect of the Hearing Panel's recommended sanction. However, the Committee has determined that Ms. Werme would benefit from consultation with a mentor to assist her in focusing on the balance between effective advocacy and application of the Professional Conduct Rules in conjunction with a suspension stayed for two (2) years.

IV. CONCLUSION

Ms. Werme is suspended for a period of six (6) months, however, this suspension is stayed for a period of two (2) years from the date of this Order. If Ms. Werme does not violate the Rules of Professional Conduct during this two year period, the suspension shall not be imposed. If Ms. Werme violates the Rules during this time, the Committee shall schedule a further hearing to determine whether a portion or all of the 6 month suspension shall be imposed. If a grievance is filed but remains unresolved during this two year period, the stay of the suspension shall be extended until such time as the grievance is resolved.

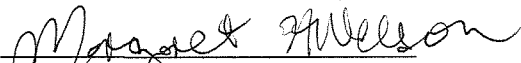
Ms. Werme shall enter into a mentoring relationship within sixty (60) days of this Order, acceptable to Disciplinary Counsel, for a period of two (2) years at her own expense. The mentoring relationship shall focus on the effective advocacy of clients within the confines of the Rules of Professional Conduct.

Ms. Werme and Disciplinary Counsel stipulated to the payment of all costs, and the Committee accepts the Stipulation as to Ms. Werme's agreement to pay all costs associated with the investigation and prosecution of this matter.

IV. RIGHT TO APPEAL

Pursuant to Supreme Court Rule 37(A)(III)(d)(2)(D)(4)(A), the parties have the right to appeal this decision to the New Hampshire Supreme Court. *See also* Supreme Court Rule 37(3)(c).

March 26, 2009


Margaret H. Nelson, Chair

Distribution:

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