

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

White, Stephen A.S. advs. Elaina Roberts # 07-044

SIX MONTH SUSPENSION STAYED FOR TWO YEARS

The Professional Conduct Committee (the “Committee”) heard Oral Argument in this matter on April 21, 2009. James L. Kruse, Assistant Disciplinary Counsel, appeared on behalf of the Attorney Discipline Office (“ADO”). The Respondent appeared pro se. The following Committee members were present: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan Chollet, David N. Cole, Richard H. Darling, Gretchen Rule Hamel, and James R. Martin. Thomas Connair was absent. Alan J. Cronheim was recused.

In preparation for the Oral Argument and subsequent deliberations the Committee reviewed the record, including, but not limited to: an original and corrected Notice of Charges; the Respondent’s Answer and Amended Answer; the ADO’s Memorandum on Sanction and exhibits (including Exhibit A, Attorney White’s lengthy disciplinary record: three Warnings, three Reprimands, one Admonition, and two Public Censures); transcripts of the Hearing Panel’s Hearing and Sanction Hearing, both dated January 12, 2009; and the Hearing Panel Report of February 6, 2009.

I. FINDINGS OF FACT

The Committee voted to accept the Findings of Fact made by the Hearing Panel. Hearing Panel Report at 4. Those facts are deemed to have been established by clear and convincing evidence.

In August 2005 Attorney White was appointed by the Strafford County Superior Court to represent Elaina Roberts in connection with various criminal charges. Following the jury’s verdict of guilty, Ms. Roberts spoke with and wrote letters to Attorney White unequivocally

stating she wanted him to file an appeal. He failed to do so, yet did not inform his client that it was her decision whether to file an appeal or inform her of any of the bases on which she could take an appeal. Therefore, Attorney White effectively deprived her of the information she needed to make an informed decision and failed to follow his client's directions as to the defense of her case. Although Attorney White argued to the Hearing Panel that his duty to file an appeal was not triggered because his client only *requested* but did not *demand* that he file an appeal, the Hearing Panel rejected, and this Committee rejects, that view. The Respondent had an ethical responsibility to file an appeal under the circumstances.

II. RULINGS OF LAW

Based on the above facts the Committee finds by clear and convincing evidence that the Respondent violated the following New Hampshire Rules of Professional Conduct:

Rule 1.17 (a)- (c): Competence

The Respondent breached this duty by failing to have specific knowledge of the law as it applied to his responsibility to file a timely notice of appeal on behalf of his client, pursuant to her request to file such a notice of appeal.

Rule 1.2 (a): Scope of Representation

The Respondent breached this duty by failing to properly consult with his client and by failing to abide and act upon her decision to appeal her convictions.

Rule 1.3 (a): Diligence

The Respondent breached this duty by failing to file a timely notice of appeal of his client's criminal convictions.

Rule 8.4 (a) Misconduct

Given the finding of violations of Rule 1.7 (a) – (b) and Rule 1.9, the Committee finds that the Respondent violated Rule 8.4(a).

III. ANALYSIS

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). In determining what constitutes an appropriate sanction for a particular rules violation, an analysis that "must take into account the severity of the misconduct," *id.*, the Committee looks to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992)(the "*Standards*") for guidance, *id.* at 513.

The *Standards* set forth four elements the Committee must consider when 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." *Id.* (citing Standard 3.0). Consideration of the first three elements creates the framework for characterizing the misconduct and determining a baseline sanction. *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."). After an appropriate baseline sanction is identified, this Committee looks to the fourth and final step in the analysis: the application of any aggravating or mitigating factors. *Id.*

Under the first prong of the analysis, the Respondent violated his duty to his client by failing to file an appeal on her behalf. Section 4.4 of the *Standards*, Lack of Diligence, offers guidance in reaching a baseline sanction for the Respondent's failure to file an appeal. It provides in pertinent part:

4.41 Disbarment is generally appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
- 4.43 Reprimand¹ is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.
- 4.44 Admonition² is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

Section 4.5, Lack of Competence, provides guidance in reaching a baseline sanction for the Respondent's failure to understand the law relating to his obligation to file an appeal. It provides in pertinent part:

- 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 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 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.

¹ "Reprimand," as used in the *Standards*, corresponds to a "Public Censure" in New Hampshire.

² "Admonition," as used in the *Standards*, corresponds to a "Reprimand" in New Hampshire.

Based on the above Standards, the baseline sanction for the Respondent's violations is public censure or suspension. He committed both negligent and knowing violations and caused actual or potential harm.

The fourth step in the analysis calls for consideration of aggravating and mitigating factors.

Aggravating factors in this case include the following:

- a. prior disciplinary record;
- b. refusal to acknowledge any wrongdoing;
- c. vulnerability of the client-victim; and
- d. substantial experience in the practice of law.

The lengthy history of disciplinary offenses committed by the Respondent is attached as Exhibit A to the ADO Memorandum on Sanction and summarized as follows: In 1991, the Respondent was **reprimanded** for violations (competency, diligence, and client communications) in connection with his failure in 1986 to undertake timely pursuit of a civil action (Lapierre, Docket No. 904188). In the same year, Attorney White was **reprimanded** for violations (competency and diligence) in connection with his lack of responsiveness and timely performance in a 1987 real estate conveyance and quiet title action (Prudden, Docket No. 904153).

In 1995, the Respondent was **reprimanded** for failure to diligently represent the interests of his client and to communicate with her in connection with a 1988 construction dispute scheduled for arbitration in 1993 (Mitchell, Docket No. 93-143). In 1996, the Respondent received a **public censure** for violations (competency, diligence, and client communications) associated with his failures to file pleadings, appear in court, and advise his client in connection with various 1992 civil proceedings (Monroe, Docket No. LD-95-010). The Respondent also received **warnings** in 1993, 2006 and 2007 addressing the issue of client communications. The 2006 disposition involved Respondent's representation of a prison inmate in 2004. He was warned to communicate promptly with his client regarding activity in the case (Rouselle, Docket No. 04-094). The Respondent received another **warning** in 2008, requiring more care in communicating about his determination to accept or decline representation (Johnson, Docket No. 04-055).

The Respondent's most recent episode of misconduct involved complaints of incompetence, lack of diligence, and failure to communicate with a prison inmate client during the period 2004 to 2006 (Tower, Docket# 06-009). On June 10, 2008, the Respondent received a **public censure with conditions**.

Throughout the Respondent's disciplinary history there is a pattern of non-responsiveness, poor communication, and lack of diligence. With that in mind, as a condition of the public censure issued in the referenced Tower matter, the Committee ordered the Respondent to complete a **mandatory diversion** under Rule 37A(I)(g)(1)(4)-(8). Pursuant to the mandatory diversion the Respondent was required to obtain a formal audit of his office management practices by a professional consultant approved by the ADO and to implement the consultant's recommendations. He was also required to complete additional CLE training in addition to the standard yearly requirements. *See* Order issued in Docket No. 06-009. Although the Respondent obtained the practice audit and favorable report by Attorney Arthur Greene, there has been no correspondence or other evidence from the Respondent establishing that he has implemented Attorney Greene's recommendations or obtained the additional CLE requirements.

There appeared to be no mitigating factors.

IV. CONCLUSION

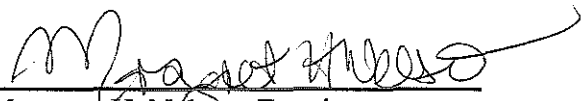
In summary, taking into consideration the four-part analysis recommended by the Standards, the appropriate sanction in this matter is a suspension. However, in light of the Respondent's having taken the first steps toward rectifying the deficits in his practice by consulting with Attorney Arthur Greene to determine the steps he needs to take to ameliorate the factors that have led to this and previous complaints, the Committee finds that it is consistent with the purpose of the Court's disciplinary power, the goals of the Rules of Professional Conduct, and this Committee's discretion to stay imposition of the six month suspension for two years *provided Attorney White meets the following conditions:*

1. Attorney White shall continue his affiliation with a law office management specialist acceptable to the Attorney Discipline Office (Attorney Arthur Greene having been previously approved) throughout the two year period during which the suspension is stayed. Attorney White shall be responsible for reporting to the

Attorney Discipline Office quarterly on the last day of March, June, September, and December as to his implementation of the consultant's recommendations. Attorney White's reports shall include a report by the consultant dated within the previous thirty days that indicates the consultant is satisfied Attorney White is making a good faith effort to implement and follow the consultant's recommendations.

2. Attorney White shall join one or more professional organizations that include New Hampshire defense attorneys and regularly attend meetings so that he has an opportunity to develop mentoring and gain insights as to how other attorneys who are similarly situated manage their practices effectively and consistent with the Rules of Professional Conduct.
3. If Attorney White demonstrates his full compliance with the above conditions for the two year period in which the suspension is stayed, the suspension will not be imposed. If the ADO receives a complaint against Attorney White during the period of the two year stay that arises out of events that occurred following the date of this Order, that complaint shall be processed by the ADO on an expedited basis. Any final adjudication of a violation of the Rules of Professional Conduct that may result from that complaint shall provide a basis for a request by Disciplinary Counsel that the Committee impose the stayed six month suspension in this case. If Disciplinary Counsel makes such a request, Attorney White shall be entitled to an evidentiary hearing and review by this Committee.
4. Attorney White is assessed all costs associated with the investigation and prosecution of this matter.

May 29, 2009


Margaret H. Nelson, Esquire
Chair

cc: James L. Kruse, Assistant Disciplinary Counsel
Stephen A.S. White, Esquire
Elaina Roberts
File

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
Peter G. Beeson
Susan R. Chollet*
Richard H. Darling*
Margaret R. Kerouac

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

Mona T. Movafaghi
Georges J. Roy*
David W. Ruoff
Richard D. Sager
Martha Van Oot
* non attorney member
Barbara J. Guay, Legal Assistant

White, Stephen A.S. advs. Richard Shaw & Susan Howarth-Shaw - #10-062
White, Stephen A.S. advs. Elaina Roberts - #07-044

CLOSED

The Committee met on April 21, 2015, to consider Assistant Disciplinary Counsel's letter to close the above matters. Members present included David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Peter G. Beeson, Richard H. Darling, Margaret R. Kerouac, Mona T. Movafaghi, David W. Ruoff, Richard D. Sager, and Martha Van Oot. Susan R. Chollet and Georges J. Roy were absent.

Upon consideration, the Committee voted to close the matters.

April 23, 2015



David M. Rothstein, Chair

Distribution:

Elizabeth M. Murphy, Assistant Disciplinary Counsel
Stephen A.S. White, Esquire
File