

New Hampshire Supreme Court  
**Professional Conduct Committee**

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\*

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

Richard H. Darling\*  
Gretchen Rule Hamel  
James R. Martin  
David N. Page\*  
James J. Tenn, Jr.  
\* non attorney member  
Holly B. Fazzino, Admin. Coordinator

*White, Stephen A.S. advs. Lucian Tower #06-009*

**PUBLIC CENSURE WITH CONDITIONS**

On December 11, 2007, the Professional Conduct Committee denied the parties' Assented To Motion To Permit Waiver of Hearings Committee Process. James L. Kruse, Assistant Disciplinary Counsel, appeared for the Attorney Discipline Office (ADO) and Stephen White, Esquire, appeared on his own behalf. The Committee denied that Motion and remanded the matter to a hearing panel for the development of a more complete record.

On May 20, 2008, the Professional Conduct Committee met and reviewed this matter and the Hearing Panel Report dated April 25, 2008. Committee members present included Margaret H. Nelson, Committee Chair; Benette Pizzimenti, Vice Chair; Alan J. Cronheim, Richard H. Darling; Gretchen Rule Hamel; James R. Martin; Thomas P. Connair; and James J. Tenn, Jr. Also participating was David N. Cole by telephone. Vice Chair Tony M. Gray was absent for deliberations and Gerald A. Daley was recused from the matter.

Having reviewed the record and considered the Hearing Panel Report, the Committee reached the following decision.

**I. Findings of Fact**

The parties agreed upon and entered into a Stipulation of Facts. The parties also stipulated to two additional facts at the discussion before the Hearing Panel on

February 27, 2008, that are also set forth below. The Professional Conduct Committee accepts the Stipulation of Facts by clear and convincing evidence as follows:

1. Respondent, Stephen A.S. White, is a New Hampshire attorney who was admitted to the Bar in 1979. At all times material to this proceeding, Mr. White was a sole practitioner operating out of his office at 44-0 Dover Point Road, Dover, New Hampshire 03820-4663.
2. The Complainant is Lucian Tower. Mr. Tower is an inmate at the New Hampshire State Prison.
3. Mr. Tower initiated this proceeding with his sworn letter of complaint dated February 16, 2006, followed by additional correspondence dated April 3, 2006. Mr. White filed a response dated March 29, 2006.
4. On July 9, 2004, Mr. Tower was ordered by the Strafford County Superior Court to appear for a sentencing hearing on September 1, 2004. Mr. Tower had been convicted of four Class A felonies, including felonious sexual assault of his minor daughter.
5. On August 9, 2004, Mr. Tower's trial counsel, Patricia Wiberg, filed a Motion to Withdraw. She represented that her client had filed a motion in which Mr. Tower claimed he had had ineffective assistance of counsel. Ms. Wiberg asked the court to appoint new counsel "to represent Mr. Tower for purposes of sentencing and appeal." Ms. Wiberg's motion was granted on August 13, 2004.
6. Following a telephone conversation between the Strafford County Superior Court Clerk's office and Mr. White, the Strafford County Superior Court appointed Mr. White to represent Mr. Tower in connection with the referenced criminal matter. The Order of appointment was issued on August 16, 2004.

7. The Superior Court's Order appointing Mr. White did not limit the scope of his representation in the subject criminal matter.
8. Mr. White had access to the Strafford County Superior Court file regarding the subject criminal matter. Mr. White reviewed the Court's file.
9. Mr. White filed a formal, general appearance on August 27, 2004. He also contacted Ms. Wiberg's office to obtain Mr. Tower's file.
10. Mr. White did not contact Ms. Wiberg to discuss Mr. Tower's case.
11. The sentencing hearing was rescheduled for September 28, 2004, and Mr. White appeared on behalf of Mr. Tower.
12. Prior to the hearing, Mr. White discussed with Mr. Tower Mr. Tower's claim of ineffective assistance of trial counsel. Mr. White advised that he did not think there was merit to Mr. Tower's claim.
13. Following hearing, the Superior Court imposed lengthy New Hampshire State Prison sentences and advised Mr. Tower of his right to sentence review.
14. On September 30, 2004, Mr. White timely filed a request for sentence review that was executed by Mr. Tower.
15. By letter of May 6, 2005, the Superior Court Clerk (Sentence Review Division) acknowledged the request and indicated that the matter would be scheduled "within the next few months" unless deferred upon notice of any New Hampshire Supreme Court appeal filed on behalf of Mr. Tower.
16. Mr. White did not file a Notice of Appeal with the New Hampshire Supreme Court on behalf of Mr. Tower.
17. Absent notice of a New Hampshire Supreme Court appeal, a sentence review hearing was

- initially scheduled for December 16, 2005, and then rescheduled for January 20, 2006.
18. Mr. Tower sent Mr. White a letter dated January 6, 2006, asking Mr. White to explain in writing why he had not filed a Notice of Appeal with the New Hampshire Supreme Court in the subject criminal matter.
  19. In his letter dated January 6, 2006, Mr. Tower also told Mr. White that he had been unable to reach Mr. White and requested a response within one week.
  20. Mr. Tower's aforesaid letter was post-marked January 17, 2006. Mr. White does not recall receiving the letter until after the January 20, 2006, sentence review hearing. Mr. White did not respond to Mr. Tower's aforesaid letter orally or in writing.
  21. Mr. White appeared with Mr. Tower at the January 20, 2006, sentence review hearing convened at the New Hampshire State Prison. However, because Mr. White erroneously presented the wrong case, the matter was rescheduled for March 17, 2006. Shortly thereafter, Mr. White requested a continuance due to a scheduling conflict.
  22. On the occasion of the January 20, 2006, hearing Mr. White and Mr. Tower did not discuss the case, other than how the sentence review hearing would proceed.
  23. At the conclusion of the January 20, 2006, sentence review hearing, Mr. White told Mr. Tower that Mr. White would see him in a few minutes after the next hearing. Mr. White proceeded to the visiting area of the prison as planned, but was denied access to Mr. Tower because there were no visiting hours on Fridays.
  24. Mr. White did not communicate with Mr. Tower or arrange another visit after being denied access to Mr. Tower at the prison on January 20, 2006, because Mr. White anticipated seeing Mr. Tower before the next sentence review hearing.
  25. Mr. White did not file a Notice of Appeal with the New Hampshire Supreme Court on

- behalf of Mr. Tower at any time after the January 20, 2006, sentence review hearing.
26. Having not served as trial counsel in the case, Mr. White did not believe that he had a responsibility under Supreme Court Rule 32(1) to file a Notice of Appeal on behalf of Mr. Tower.
  27. Mr. White did not convey his aforesaid belief to Mr. Tower at any time during his representation of Mr. Tower.
  28. On February 2, 2006, Mr. Tower, *pro se*, moved the New Hampshire Supreme Court for leave to file a late appeal and for appointment of counsel.
  29. In his aforesaid motion of February 2, 2006, Mr. Tower claimed that Mr. White had failed to file a Notice of Appeal on his behalf, that Mr. White had failed to respond to his letter asking for information about such filing, and that he was contemplating filing an attorney discipline complaint against Mr. White.
  30. Mr. Tower forwarded a copy of his aforesaid motion of February 2, 2006, to Mr. White.
  31. Mr. White did not file a response to Mr. Tower's aforesaid motion of February 2, 2006.
  32. On April 20, 2006, the New Hampshire Supreme Court granted Mr. Tower's motion and, citing Supreme Court Rule 32, directed Mr. White to file a Notice of Appeal on Mr. Tower's behalf. However, by that time, Mr. Tower had already filed the disciplinary complaint (February 16, 2006) against Mr. White that is the subject of this proceeding. In addition, Attorney Michael J. Sheehan had been appointed by the Strafford County Superior Court (April 17, 2006) to replace Mr. White and to represent Mr. Tower at his rescheduled sentence review hearing.
  33. On May 3, 2006, Mr. White filed a Request for Instructions with the New Hampshire Supreme Court, requesting that replacement counsel be appointed to represent Mr. Tower

on appeal.

34. By Order of May 24, 2006, the New Hampshire Supreme Court granted Mr. White's Request for Instructions.
35. Mr. Sheehan represented Mr. Tower in connection with his New Hampshire Supreme Court appeal. The Court issued an order dated August 28, 2007, affirming the convictions below.
36. Mr. Tower was convicted in his criminal matter by jury verdict on June 17, 2004.
37. In order to timely appeal Mr. Tower's conviction, the deadline for filing a Notice of Appeal with the New Hampshire Supreme Court was October 28, 2004.

## **II. Rulings of Law**

The Professional Conduct Committee determined that the record in this matter supports the following Rulings of Law by clear and convincing evidence:

### **Rule 1.1(a) – (c): Competence**

38. Allegations set forth above are incorporated by reference.
39. Mr. White had an attorney-client relationship with Mr. Tower from and after August 16, 2004, when he was appointed by the Superior Court to represent Mr. Tower in the criminal matter.
40. Mr. White's responsibilities as appointed counsel were not limited to appearing on behalf of Mr. Tower at the sentencing hearing. He was also responsible for representing Mr. Tower on appeal, unless relieved of such responsibilities by the Court. See Supreme Court Rule 32.
41. Mr. White owed Mr. Tower a duty to provide him with competent representation in connection with the pending criminal matter.

42. Mr. White breached said duty owed to Mr. Tower in that Mr. White did not have specific knowledge of the law insofar as it related to the scope of his responsibility as appointed defense counsel for Mr. Tower and Mr. White failed to attend to details necessary to assure protection and pursuit of Mr. Tower's right of appeal.
43. The above conduct of Mr. White constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.1(a)-(c).

**Rule 1.3(a): Diligence**

44. Allegations set forth above are incorporated by reference.
45. Mr. White owed Mr. Tower a duty to act with reasonable promptness and diligence in representing Mr. Tower.
46. Mr. White breached the foregoing duty by failing to file a timely New Hampshire Supreme Court appeal on behalf of Mr. Tower.
47. The above conduct by Mr. White constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.3(a).

**Rule 1.4: Client Communications**

48. Allegations set forth above are incorporated by reference.
49. Mr. White owed Mr. Tower a duty to keep Mr. Tower reasonably informed regarding the status of the criminal matter and to comply promptly with Mr. Tower's reasonable requests for information about the case.
50. Mr. White breached the foregoing duty by neglecting to respond over an extended period of time with Mr. Tower about the status of his case.
51. The above conduct by Mr. White constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.4.

### **Rule 8.4(a): Misconduct**

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

### **III. Analysis of the Appropriate Sanctions**

While the parties stipulated to the applicable Facts, as set forth above, the parties disagreed upon whether the Facts constitute a violation of the Rules. In light of the above-referenced Findings of Fact and Rulings of Law, the Professional Conduct Committee sets forth the following analysis. The purpose of attorney discipline is not to inflict punishment, but rather 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.” Grew’s Case 156 N.H. 361, 365 (2007), quoting Coddington’s Case 155 N.H. 66, 68 (2007).

Although the New Hampshire Supreme Court has not adopted the American Bar Association’s Standards For Imposing Lawyer Sanctions (2005)(Standards), they are looked to for guidance. Id. The Standards set forth four factors to consider when imposing sanctions:

- (1) The duty violated by the lawyer;
- (2) The lawyer’s mental state;
- (3) The actual or potential injury caused by the lawyer’s misconduct; and
- (4) The existence of aggravating or mitigating factors.

Standards, supra § 3.0; Coddington’s Case, 155 N.H. at 68.

The first three factors are used to categorize the attorney’s misconduct and to identify a baseline sanction. The fourth factor, aggravators or mitigators, is then addressed to arrive at the ultimate sanction. Grew’s Case at 365. As set forth above, Mr. White violated his duty to

provide competent representation, to act diligently in representing his client, and failed to communicate properly with his client. The Standards § 4.43, state that a public censure<sup>1</sup> 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.” Standards § 4.43. In this case, Mr. White was negligent in failing to adequately review and understand the scope of his representation of his client. While Mr. White did not represent the individual at issue during trial, Mr. White was appointed to represent this client for sentencing. In appointing Mr. White, the Court did not limit the scope of representation. As such, Mr. White should have addressed with his client, in addition to sentencing issues, the issue of a criminal appeal.

In fact, the Motion To Withdraw filed by trial counsel, requested in Paragraph D of the Wherefore clause, that the Court: “Appoint new counsel to represent [client] for the purposes of sentencing and appeal;” (emphasis added).

Mr. White offered in support of his position, his interpretation that Supreme Court Rule 32 relating to the filing of an appeal, did not apply to him as he was not trial counsel. This explanation is difficult to understand as Attorney White knew that trial counsel had withdrawn from this matter due to a conflict with the client and that there was no other attorney involved to file an appeal on behalf of this criminal client. Further, Mr. White could have spoken to trial counsel regarding this matter and should have determined from his review of the file that the issue of an appeal was required to be addressed.

The Professional Conduct Committee maintains that Mr. White should have communicated with his client about the issue of an appeal and more specifically the deadline to file an appeal. It is clear that Mr. White was aware that an appeal should have been filed thirty

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<sup>1</sup> Section 4.43: Reprimand [construed as public censure under N.H. Sup. Ct. R. 37(2)(g)].

days after the sentencing hearing. After the sentencing hearing, Mr. White did timely file for sentence review, which also carries a thirty day deadline, but did not address the issue of appeal. The Committee is aware that communicating with incarcerated clients poses additional challenges, but those challenges can be met through appropriate efforts.

As to the factor involving mental state, the Committee finds that Mr. White's failure to file an appeal was not intentional but negligent.

The third factor addresses actual or potential injury caused by the lawyer's misconduct. In this case, there was no actual injury because the New Hampshire Supreme Court ultimately did accept the client's appeal.

The final factor to consider involves aggravating or mitigating circumstances. The Committee acknowledges Mr. White's absence of a dishonest motive, his good faith effort to address his office and practice policies, and his full cooperation regarding this matter. See Standards § 9.32 (b); (e); and (j). The Committee applies these mitigators.

However, there is also a significant aggravating factor involving Mr. White's prior disciplinary history. See Standards § 9.22 (a). Mr. White has had three reprimands, an admonition, a public censure, and two warnings. The Committee is concerned that Mr. White could face difficulty with future clients should his conduct continue.

#### **IV. Sanctions**

The Professional Conduct Committee hereby issues a Public Censure with the following conditions:

1. Mr. White shall complete mandatory diversion under Rule 37A (I)(g)(4)-(8). Mr. White shall arrange for and undergo, at his own expense, a formal audit of his office management practices by a professional consultant skilled in office management. Mr.

White shall implement any and all recommendations of the consultant. The consultant must be approved by the ADO before the audit is undertaken.

2. The focus of such audit shall be on Mr. White's office practices, systems, and resources relating to: a) receipt and filing of, and timely response to, all communications and materials; b) client communications; c) planning and tracking case development; d) calendaring and acting upon deadlines and commitments; e) researching issues of law and procedure; and f) availability and training of support staff.
3. Mr. White shall undergo the audit within three months of the date of the final order issued in this proceeding. The ADO shall have the authority to contact the consultant to determine whether and to what extent the audit has been completed and whether and to what extent Mr. White has implemented the consultant's recommendations. Mr. White shall fully implement the consultant's recommendations and show proof of same to the ADO, in the form of a written report, within six months of the order issued in this matter.
4. A subsequent audit, with the same focus as identified in paragraph two (2) herein, shall be performed by the same consultant, or one approved by the ADO, no later than eighteen months, but not before fifteen months, after the date of this Order. Mr. White shall bear the cost and expense for such audit. The consultant shall prepare a written report, documenting the results of the subsequent audit, which report shall be filed with the ADO.
5. In the event that Mr. White is unable or unwilling to comply with the terms of the mandatory diversion, and/or fails to allow the ADO to oversee his compliance therewith, Mr. White shall be brought before the Professional Conduct Committee on a petition to show cause why he should not be held in contempt and subject to further orders of

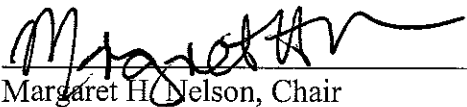
the Committee.

6. In addition to the standard requirement for completing annual continuing legal education, within one (1) year of the date of the Final Order issued in this proceeding, Mr. White shall be required to complete six (6) additional continuing legal education credits focusing on the following: (1) law office management; (2) criminal appellate procedure; and (3) risk management, and Mr. White shall provide confirmation to the ADO of his completion of those credits. These additional credits shall not be used as carry-over credits for future annual CLE requirements.

**V. Stipulation As To Costs**

The Professional Conduct Committee accepts the Stipulation As To Costs, in that Mr. White agrees to pay the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter.

June 10, 2008

  
Margaret H. Nelson, Chair

**Distribution:**

James L. Kruse, Assistant Disciplinary Counsel  
Stephen A.S. White, Esquire  
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