

New Hampshire Supreme Court

Professional Conduct Committee

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REISSUED RECOMMENDATION TO PETITION SUPREME COURT FOR DISBARMENT

The Professional Conduct Committee (the “Committee”) heard oral argument in this matter on December 9, 2008. James L. Kruse, Assistant Disciplinary Counsel, appeared on behalf of the Attorney Discipline Office (“ADO”). The respondent appeared pro se. The complainant, Deborah Stacy, was present with her attorney, Terrie Harman. David Stacy, the complainant’s brother whose representation by Attorney Wyatt led to this complaint, was present with his attorney, Roy S. McCandless. The following Committee members were present:

Margaret H. Nelson, Chair, Toni M. Gray, Vice Chair, Susan Chollet, David N. Cole, Gerald A. Daley, Richard H. Darling, James R. Martin, and Marilyn Billings McNamara. Benette Pizzimenti, Vice Chair, Thomas P. Connair, Alan J. Cronheim, and Gretchen Rule Hamel were absent. No member was recused from deliberation. Susan Chollet abstained.

In preparation for the oral argument and subsequent deliberation the Committee reviewed a voluminous record, including: an original and amended Notice of Charges and the respondent’s Answers; a Stipulation dated April 4, 2008, the ADO’s Proposed Findings of Fact and Rulings of Law; Attorney Wyatt’s Memorandum of Law in Support of Respondent’s Request for a Finding of No Misconduct; transcripts of hearings before the Hearings Committee on May 1 and June 26,

2008; a Supplemental Stipulation and Mr. Kruse's Memorandum on Sanction; a Reissued Hearing Panel Report with Correct Attachment dated April 24, 2008; and other documents.

Before hearing Oral Argument the Committee considered a letter dated December 5, 2008, from Attorney Terrie Harman and her Appearance on behalf of Deborah Stacy. Attorney Harman's letter requested the Committee to permit Attorney Harman to address additional evidentiary matters as part of oral argument. The Committee is an appellate body, not an appropriate tribunal to consider new evidence not considered below by a Hearings Committee. Rule 37(III)(c)(2). Additionally, when Ms. Stacy made a similar request to the Hearings Committee and the request was denied, she failed to move for reconsideration or to appeal that ruling. Accordingly, the renewed request is untimely. On those bases, the Committee denied the request, but determined that the letter and the Appearance shall remain in the record for the purpose of appellate review.

I. FINDINGS OF FACT

The Committee voted to accept a Stipulation of Facts dated April 4, 2008 (PCC Tab 27) and a Supplemental Stipulation dated June 16, 2008 (PCC Tab 41), both of which are appended to this Order. The facts set forth in those stipulations are deemed to have been established by clear and convincing evidence.

In brief, the stipulated facts establish that Attorney Wyatt represented David Stacy, an individual who appeared to suffer from significant psychological and physical impairment during much of the period of time in which Attorney Wyatt represented him. Despite this ongoing relationship, Attorney Wyatt also undertook representation of other parties whose interests were diametrically opposed to Mr. Stacy's interests. Attorney Wyatt steadfastly refused to recognize

even a potential conflict of interest, despite the issue having been brought to his attention by opposing counsel and at least one court on several occasions. Attorney Wyatt gained substantial financial benefit through his representation of parties whose interests were adverse to Mr. Stacy: approximately \$140,000 over a period of eighteen months. Mr. Stacy suffered significant harm as a direct result of Attorney Wyatt's actions. Attorney Wyatt continues to assert that his actions at all times were appropriate and that no conflict of interest ever existed because at all times he had Mr. Stacy's best interests at heart.

II. RULINGS OF LAW

Based on the above referenced stipulated facts, the Committee finds by clear and convincing evidence that Attorney Wyatt violated the following Rules of Professional Conduct: Rule 1.7(a)-(b): Conflict of Interest, General Rule; Rule 1.9: Conflict of Interest, Former Client; Rule 1.5: Illegal or Excessive Fees; and Rule 8.4(a): General Rule. The Committee also finds persuasive and adopts the Hearings Committee's rulings of law regarding Attorney Wyatt's violation of these rules, which follow in pertinent part:

Rule 1.7(a) and 1.7(b): Conflict of Interest

Mr. Wyatt violated Rule 1.7 (a)-(b) in that he had a conflict of interest when he represented both Mr. Stacy and the Conservatorship which oversaw Mr. Stacy's estate. Mr. Wyatt knew, or should have known, a potential for conflict would arise when representing both an individual and the conservatorship charged with administering his client's estate. At no time did Mr. Wyatt explain to Mr. Stacy the potential for conflict. Instead he gave Mr. Stacy the comfort of believing he was representing his interests while also representing the conservatorship.

The conflict of interest was exacerbated when Mr. Wyatt represented Mr. Brault and Ms. Svetlana Stacy in the guardianship hearings in both New Hampshire and Texas. Mr. Wyatt was not forthcoming to the Judge in the guardianship hearing in Carroll County Probate Court as to whether he was representing Mr. Stacy when in fact he was representing the interests of Mr. Brault and Svetlana Stacy.

Further, Mr. Wyatt breached his duty to Mr. Stacy by misrepresenting to Mr. Stacy that Mr. Wyatt was not representing Svetlana Stacy and Mr. Brault against Mr. Stacy in connection with the guardianship proceedings. The record is clear that he was providing legal counsel to Mr. Brault and Svetlana Stacy in the petition for guardianship. Further, Attorney Wyatt breached a duty owed to Mr. Stacy when he led Mr. Stacy to believe that he was not representing Svetlana Stacy and Mr. Brault.

The effect of Mr. Wyatt's conflict and the authority offered and exercised by Mr. Wyatt was to deny Mr. Stacy counsel in a guardianship hearing where his legal rights are "absolute and unconditional" (RSA 464-A:6).

Based on clear and convincing evidence, the Panel finds Mr. Wyatt violated Rule 1.7 (a) and Rule 1.7(b): Conflict of Interest.

Rule 1.9: Conflict of Interest, Former Client

Mr. Wyatt represented Mr. Stacy in connection with the Master Contract as well as various matters relating to his financial and personal well-being and support; the implementation and creation of the conservatorship and other personal matters. At some point after the creation of the conservatorship Mr. Wyatt ceased representing Mr. Stacy. Although the record is unclear as to when the representation of Mr. Stacy by Mr. Wyatt actually ended, it is evident that, at the latest, representation ended in April, 2002, when Mr. Wyatt was instructed by Mr. Stacy's Texas attorney *ad litem* that he no longer represented Mr. Stacy. At this point on Mr. Wyatt had a duty to refrain from representing any other client with interests materially adverse to Mr. Stacy without properly obtaining Mr. Stacy's approval.

Mr. Wyatt breached the aforesaid duty on several occasions after he ceased being Mr. Stacy's attorney including, but not limited to:

1. Representing the conservatorship and/or Mr. Brault in connection with the disputes with Mr. Stacy over the disposition and management of Mr. Stacy's assets and expenditure of conservancy funds.
2. Representing the conservatorship by negotiating a loan to be secured by the conservatorship (Mr. Stacy's estate) to finance guardianship proceedings in Texas, proceedings to which Mr. Stacy objected and during which Mr. Stacy was not afforded access to his own counsel.
3. Representing Mr. Brault in contesting the appointment by the Harris County, Texas Probate Court of Deborah Stacy, notwithstanding Mr. Stacy's stated preference for Deborah Stacy as his guardian.

These breaches of Mr. Wyatt's duty to Mr. Stacy's interests were further complicated when Mr. Wyatt represented himself and Mr. Brault when Mr. Stacy

objected to the accounting for the conservatorship included allegations of conflict of interest, and financial impropriety. Mr. Wyatt represented his own and Mr. Brault's interests when Mr. Stacy demanded refunds, reimbursement from Mr. Wyatt, Mr. Brault and the conservatorship. In fact, Mr. Wyatt resisted Mr. Stacy's access to independent counsel to pursue the aforementioned allegations, claims and demands.

Based on clear and convincing evidence, the Panel finds Mr. Wyatt violated Rule 1.9: Conflict of Interest, Former Client.

Rule 1.5: Fees

A stipulation was submitted by Mr. Wyatt and Mr. Kruse as to the billings to and payments from the conservatorship for representation of Mr. Stacy and the conservatorship and Mr. Brault. Both Mr. Kruse and Mr. Wyatt addressed the issue of the legality of those legal fees.

The Panel determined that those fees generated during the period of time when Mr. Wyatt was acting in violation of Rule 1.7 (a) and (b) and Rule 1.9, were not legal.

Based on clear and convincing evidence, the Panel finds Attorney Wyatt violated Rule 1.5: Fees.

Rule 8.4 (a): Misconduct

Given the finding of violations of Rule 1.7(a) and Rule 1.7(b), and Rule 1.9, the Panel finds Misconduct under Rule 8.4(a).

Reissued Hearing Panel Report at 2-5.

III. ANALYSIS

Based on the above referenced stipulated facts and record, Assistant Disciplinary Counsel recommends that the appropriate sanction in this matter should be a "lengthy suspension."

Attorney Wyatt requests, supported by a Memorandum of Law and his oral argument on December 9, 2008, that the Committee enter a "unanimous finding of no misconduct."

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, Attorney Wyatt violated his duty to David Stacy by failing to avoid numerous conflicts of interest while representing Mr. Stacy that were open and obvious and brought to Attorney Wyatt’s attention on several occasions. While Attorney Wyatt represented Mr. Stacy’s conservatorship, the conservatorship’s main goal was to curtail the manner in which Mr. Stacy dealt with his assets. During the period of time Attorney Wyatt undertook representation of Svetlana Stacy or at least attempted to accomplish goals that were solely in her interest, Mrs. Stacy was involved in numerous family law disputes with Mr. Stacy

and attempting to gain control over Mr. Stacy's assets. When Attorney Wyatt was representing himself in attempting to justify his legal fees, his own interests were adverse to both Mr. Stacy's and the conservatorship's interests in minimizing legal expenses.

In short, Attorney Wyatt violated his ethical obligation to David Stacy when he simultaneously represented Mr. Stacy and individuals or entities with interests in conflict with Mr. Stacy's interests. Even after Attorney Wyatt terminated his representation of Mr. Stacy, his representation of individuals or entities with interests adverse to Mr. Stacy's still constituted an impermissible conflict of interest, because the matters were substantially similar (and one might even say identical), and facts Attorney Wyatt learned during his representation of Mr. Stacy were substantially likely to be relevant to resolution of the new issues.

As set forth in the *Standards*, "the following sanctions are generally appropriate in cases involving conflict of interest:"

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of the client(s):
- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that

conflict, and causes injury or potential injury to a client.

- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Standards § 4.3, Failure to Avoid Conflicts of Interest.

The Committee found that Attorney Wyatt's representation of Mr. Stacy matches the parameters described in ¶ 4.31 (b) or ¶ 4.31(c). Attorney Wyatt simultaneously represented David Stacy, the conservatorship established to govern the disposition of Mr. Stacy's funds and assets, the conservator, Mr. Stacy's wife with whom Mr. Stacy was experiencing marital difficulties and who was attempting to gain greater access to Mr. Stacy's funds and assets, and his own interests with respect to questions raised about his fees. Attorney Wyatt began representing David Stacy in 1998. Even disregarding Attorney Wyatt's lack of vision in failing to recognize potential conflicts of interest given his various clients' clearly competing interests, by early 2002 Attorney Wyatt knew or should have known that his continued representation of Mr. Stacy and the conservatorship following the emergence of material disputes between Mr. Stacy and the conservator and Mr. Stacy's expressions of distrust of the conservator and Attorney Wyatt presented a conflict for Attorney Wyatt in continuing to represent *any* of these parties.

Attorney Wyatt knew or should have known when he initiated temporary guardianship proceedings in New Hampshire on behalf of the conservator and Mrs. Stacy that Mr. Stacy needed independent counsel. Nevertheless, Attorney Wyatt told Mr. Stacy that Attorney Wyatt was representing Mr. Stacy's interests. Attorney Wyatt knew or should have known when he

participated in guardianship proceedings in Texas that were directly opposed to Mr. Stacy's expressed interests that the dual representation constituted an impermissible conflict of interest. Mr. Stacy continued to object to the guardianship when Attorney Wyatt appeared in the Harris County Probate Court in June 2002, yet Attorney Wyatt continued to deny the conflict, even when he was disqualified from pro hac vice admission by the Harris County Probate Court on the basis of the conflict. Then, despite the Court's Order, in what can only be deemed a deliberate attempt to circumvent that Order, Attorney Wyatt continued to represent and advise parties adverse to Mr. Stacy without filing an appearance and continued to bill for these services.

When Attorney Wyatt filed new pleadings in the Carroll County Probate Court in New Hampshire seeking an extension of temporary orders and the indefinite appointment of Mr. Brault as Mr. Stacy's guardian, Attorney Wyatt knew that Mr. Stacy objected to these proceedings. Therefore, even if by this time Attorney Wyatt had unequivocally terminated his representation of Mr. Stacy (which he had not), Attorney Wyatt should have recognized that a conflict of interest existed under Rule 1.9 relating to representation of adverse parties against a former client. Similarly, when Attorney Wyatt defended the conservatorship's accounting against objections raised by Mr. Stacy's new counsel and defended himself against claims of conflict during the period from August 2002 to March 2003, Attorney Wyatt knew or should have known that he was representing the conservatorship, the conservator, and his own interests against the asserted interests of his former client, Mr. Stacy.

During the period from July 2001 to February 2003 in which Attorney Wyatt effectively abandoned his representation of Mr. Stacy and began representing clients who had interests directly opposed to Mr. Stacy (although at the same time, continuing to let Mr. Stacy believe that

Attorney Wyatt was representing him), Attorney Wyatt billed his new clients approximately \$140,000. The Committee is entitled to apply reasonable inferences from stipulated facts to draw additional conclusions as to facts not stipulated. It is a reasonable inference to be drawn under these circumstances that Attorney Wyatt intended to benefit himself through his receipt of these substantial legal fees. It is also a reasonable inference to be drawn under these circumstances that Attorney Wyatt stopped representing Mr. Stacy and began representing individuals with interests adverse to Mr. Stacy without regard to the tangible and intangible costs to David Stacy, a client laboring under severe mental and physical handicaps. The risk of harm to Mr. Stacy included his being effectively unrepresented in circumstances in which effective and loyal representation was a statutory necessity, lost access to his estate, detriment to the proper provision for and oversight of his medical care, and the cost of legal services.

Based on the stipulated facts and reasonable inferences to be drawn there from, Attorney Wyatt's behavior goes far beyond knowing about a conflict of interest and merely not fully disclosing to his client the possible effect of that conflict - the standard of behavior when suspension is appropriate. *Standards* § 4.32. Accordingly, the Committee finds that the baseline sanction in this matter is disbarment, not suspension. This conclusion is further buttressed by the Hearings Committee's and this Committee's finding that Attorney Wyatt violated Rule 1.5 by knowingly charging and collecting fees and expenses for legal services rendered while Attorney Wyatt was operating under a conflict of interest, money Attorney Wyatt has made no attempt to return to the parties wrongfully charged.

The final step of the sanction analysis is to identify any aggravating or mitigating factors and determine whether they affect the baseline sanction. As to aggravating factors, the


Committee found that the large amount of legal fees garnered by representing clients with adverse interests to Mr. Stacy's constitutes a selfish motive, that Attorney Wyatt engaged in a pattern of misconduct with multiple offenses, that he has steadfastly refused to acknowledge the wrongful nature of his conduct, that Mr. Stacy was vulnerable as a result of his mental and physical incapacity and Attorney Wyatt took advantage of this vulnerability, that Attorney Wyatt has substantial experience in the practice of law, and, having made no effort to return any of the fees Attorney Wyatt was found to have wrongfully charged or even to putting those amounts in escrow if Attorney Wyatt feels that claims against him are unfounded, his lack of action in this regard manifests an indifference to making restitution. As to mitigating factors, the Committee found that Attorney Wyatt has no prior disciplinary record, that he has an excellent reputation among practicing attorneys, and that these disciplinary proceedings have been delayed (a factor considered as a mitigator under the *Standards*, but which the New Hampshire Supreme Court has previously indicated it does not consider a mitigating factor). Consideration of these aggravating and mitigating factors leads the Committee to the conclusion that disbarment is not only the appropriate baseline sanction, it remains the appropriate sanction to be imposed in this case.

IV. CONCLUSION

In view of the seriousness of Attorney Wyatt's misconduct, the length of time over which it took place, his self interest in pursuing the course of action that brought him before the Committee, and his steadfast refusal or inability to understand the nature of his misconduct despite its obviousness and despite several court hearings in which these conflicts of interest were brought to his attention, it is the Committee's view that the public can be protected, public

confidence in the bar can be maintained, and the integrity of the legal profession can be preserved only through Attorney Wyatt's disbarment. Accordingly, the Committee directs Disciplinary Counsel to petition the Supreme Court for Attorney Wyatt's unconditional disbarment and assess Attorney Wyatt the Committee's expenses of investigating and prosecuting this matter. N.H. Sup. Ct. R. 37(19).

January 20, 2009


Margaret H. Nelson, Esquire
Chair

Distribution:

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