

New Hampshire Supreme Court
Professional Conduct Committee

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PUBLIC CENSURE

On November 17, 2009, the Professional Conduct Committee deliberated the above captioned matter. Members present included: Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni Gray, Vice Chair, Susan R. Chollet, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, and Jennifer L. Parent. David N. Cole, Thomas P. Connair, Gretchen Rule Hamel and James R. Martin were absent.

Upon consideration, the Committee voted to accept the Joint Motion to Permit Waiver of Formal Proceedings.

I. FINDINGS OF FACT

The Respondent and the ADO have stipulated, and the Committee accepts the Stipulation, (“Stipulation”) as to the facts of this matter. Accordingly, the facts described below as set forth in the Stipulation are established by clear and convincing evidence:

Ms. Stodolski is an attorney who was admitted to the New Hampshire Bar in 1975.

At all times material to this proceeding, Ms. Stodolski has operated as a solo practitioner with an office located in Manchester, New Hampshire.

Ms. Stodolski was retained by Martin Vandegrift in connection with a divorce action filed by Marthe Vandegrift in Hillsborough County Superior Court

(Northern District) in September 2005. (In the Matter of Marthe A. Vandegrift and Martin L. Vandegrift, No. 05-M-1326.) Edrea M. Grabler, Esq., represented Marthe Vandegrift in the proceeding.

Upon filing the initial petition for divorce and request for temporary orders, the Hillsborough County Superior Court issued an Order of Notice dated September 26, 2005. The Order included a Temporary Restraining Order, providing as follows:

Marthe A. Vandegrift and Martin L. Vandegrift are restrained from selling, transferring, encumbering, hypothecating, concealing or in any other manner whatsoever disposing of any property, real or personal, belonging to either or both of them except by written agreement of both parties; for reasonable and necessary expenses of living; in the ordinary and usual course of business or investing; or by order of the Court.

At the time of the commencement of the New Hampshire divorce action, Mr. Vandegrift had a lawsuit pending in Connecticut against his former employer, Wieland Dental Systems, Inc. (“Wieland”) Mr. Vandegrift sought money damages in connection with his termination by Wieland in 2004. Mr. Vandegrift was represented by Connecticut counsel, on an hourly fee basis, in connection with the claim against Wieland.

Ms. Vandegrift was aware of the fact that Mr. Vandegrift was pursuing a claim against Wieland.

On October 26, 2005, Ms. Vandegrift propounded a set of interrogatories and requests for production to be answered by Mr. Vandegrift in connection with the New Hampshire divorce action. Paragraph 24 posed the following question:

24. With respect to any proposed or pending litigation in which you are or may be a party other than the litigation for which these interrogatories are being answered, including but not limited to Martin Vandegrift v. Wieland Systems, Inc. & Axel Pomeranz, please state:
 - a. the procedural status of the litigation;
 - b. the dates and descriptions of all future matters scheduled before the Court.

In anticipation of a hearing on temporary orders scheduled for November 28, 2005, the Vandegrifts executed a Proposed Partial Temporary Decree, which included a provision entitled, “Restraints Against Property.” The provision incorporated language of the Court’s aforementioned Temporary Restraining

Order. On November 29, 2005, the Court issued Temporary Orders which included the parties' Proposed Partial Temporary Decree.

On January 6, 2006, Mr. Vandegrift prepared responses to the aforementioned interrogatories and gave them to Ms. Stodolski. Ms. Stodolski supplied the responses to Ms. Vandegrift's counsel without careful review. With respect to the question at paragraph 24, Mr. Vandegrift represented as follows: "a. No Action; b. None."

By letter dated April 24, 2006, Mr. Vandegrift's Connecticut counsel notified Mr. Vandegrift and Ms. Stodolski of the status of the case against Weiland and the anticipated costs associated with resolving the claim. Shortly thereafter, the case was settled. Pursuant to a settlement agreement, Weiland issued a check to Mr. Vandegrift dated May 22, 2006, in the amount of \$85,000.

Mr. Vandegrift gave Ms. Stodolski the settlement check and she deposited the funds in her client trust account. Mr. Vandegrift instructed Ms. Stodolski to make certain disbursements from the settlement funds to cover legal fees charged by his Connecticut counsel, to pay back loans used to fund the Connecticut litigation, and to pay certain other bills. Ms. Stodolski reminded Mr. Vandegrift about the non-hypothecation provision of the temporary decree issued in the New Hampshire divorce action, but she complied with Mr. Vandegrift's instructions and made the disbursements. Mr. Vandegrift and Ms. Stodolski anticipated the need to provide the Court in the divorce action with a full accounting of the settlement funds.

Pursuant to Mr. Vandegrift's instructions, Ms. Stodolski disbursed approximately \$41,500 on June 9, 2006, and an additional \$2000 on August 31, 2006. These disbursements from Mr. Vandegrift's settlement funds included \$6000 paid to Ms. Stodolski for her fees. Disbursements were also made for certain personal expenses incurred by Mr. Vandegrift, totaling \$8000. After the disbursements, approximately \$41,500 remained in the client trust account maintained for Mr. Vandegrift.

All of the aforementioned disbursements were made by Ms. Stodolski while the divorce action was still pending. The disbursements were made without obtaining Ms. Vandegrift's consent or leave of the Court.

Ms. Stodolski did not inform Ms. Grabler of the settlement of Mr. Vandegrift's Connecticut claim or of the aforementioned disbursements until October 2006. Ms. Stodolski's letter to Ms. Grabler of October 23, 2006, accurately listed the payees and amounts disbursed.

At a hearing on the merits of the divorce action convened on December 12 and 13, 2006, the Court addressed the issue whether Mr. Vandegrift had violated the Court's initial restraining order precluding the hypothecation of a party's assets. The Court rejected Ms. Stodolski's argument that Mr. Vandegrift did not have the settlement money at the time of such order. Citing the New Hampshire Supreme Court's decision in Shafmaster v. Shafmaster, 138 N.H. 460 (1994), the Court confirmed Mr. Vandegrift's obligation to notify the opposing party when he settled the Connecticut claim and his obligation to refrain from disposing of the money obtained from the settlement.

A final Decree of Divorce was issued on December 28, 2006. Among other assets, the Court included in the marital estate to be divided by the parties, the following: "\$41,957 of the net of Mr. Vandegrift's [Connecticut] court settlement." The Court found that figure "to be a fair reflection of the net Mr. Vandegrift received after giving him a credit of paying for legal fees." However, the Court "was greatly disturbed by the actions of Mr. Vandegrift and his counsel." The Court found that the Connecticut case was settled and "counsel did not inform opposing counsel of the settlement and the disbursal of the funds. That is a clear violation of counsel's obligation under Shafmaster. Mr. Vandegrift's disbursal of said funds without agreement of the parties or order of the Court is a clear violation of the restraining order that has been in effect since September 2005."

Stipulation ¶¶ 1-16, at 1 to 5.

II. RULINGS OF LAW

The Respondent and the ADO have stipulated, and the Committee accepts the Stipulation as to the Rules of Professional Conduct that were violated. The Stipulation establishes these violations by clear and convincing evidence:

Rule 1.1(a)-(c): Competence

There is clear and convincing evidence that Ms. Stodolski breached said duty, as follows:

Ms. Stodolski owed Mr. Vandegrift a duty to provide competent representation. In this regard, Ms. Stodolski was bound to have specific knowledge about material substantive and procedural issues in connection with domestic relations litigation and to perform in a manner consistent with applicable law.

Ms. Stodolski breached said duty as follows:

- a) Ms. Stodolski lacked specific knowledge or understanding of the law as it relates to standing court orders restraining the hypothecation of a client's assets pending resolution of an underlying divorce action.
- b) Ms. Stodolski failed to properly advise Mr. Vandegrift as to the handling of settlement funds received by Mr. Vandegrift in connection with a Connecticut proceeding while the subject New Hampshire divorce proceeding was still pending; and
- c) Ms. Stodolski failed to act or to refrain from acting on behalf of Mr. Vandegrift in a manner consistent with applicable law by failing to provide timely notice to opposing counsel of the Connecticut settlement and by disbursing settlement funds without the necessary authority.

Stipulation ¶¶ 18-21, at 6-7.

Rule 3.4: Fairness to Opposing Party and Counsel

There is clear and convincing evidence that Ms. Stodolski breached said duty as follows:

Ms. Stodolski owed a duty to her opponent and to the Court to comply with the law and rules of the Court relating to the hypothecation of her client's assets pending disposition of the underlying divorce action. She also owed a duty to her opponent to provide timely and accurate discovery information relating to Mr. Vandegrift's assets.

Ms. Stodolski breached her duty by knowingly disobeying the Court's standing order and the parties' stipulated temporary decree relative to hypothecation of her client's assets by disbursing settlement proceeds obtained by Mr. Vandegrift in the Connecticut proceeding without the requisite authority.

Ms. Stodolski also breached her duty by failing to provide her opponent with accurate and timely information relative to the status and settlement of the Connecticut proceeding.

Stipulation ¶¶ 22-26, at 7.

Rule 8.4(a): Misconduct

There is clear and convincing evidence that Ms. Stodolski breached said duty, having found the foregoing violations.

Stipulation ¶¶ 27, at 8.

III. ANALYSIS

The Committee agreed, consistent with the stipulated recommendation, that the

appropriate sanction in this matter is a public censure and that this sanction serves the purposes of attorney discipline.

Both case law in New Hampshire and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support the Committee's conclusion that Ms. Stodolski should receive a public censure.

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.*, *Conner's Case*, 158 N.H. 299, 303 (2009). "The sanction must take into account the severity of the misconduct." *Coffey's Case*, 152 N.H. 503, 513 (2005).

Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner's Case*, 158 N.H. at 303. The *Standards* set forth a four part analysis for courts to consider in 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.* (quoting *Douglas' Case*, 155 N.H. 613, 621 (2007)); *Standards* § 3.0.

The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. *See Conner's Case*, 158 N.H. at 303. ("In applying these factors, the first step is to categorize the respondent's misconduct and identify the appropriate sanction.") Once the baseline sanction is determined, the Court then looks to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *See id.*

Under the first prong of the analysis, Ms. Stodolski violated duties owed to her client, to her opponent, and to the Court. Ms. Stodolski breached duties owed to her client by failing to provide competent representation relative to the handling of the settlement proceeds obtained in the Connecticut proceeding. Ms. Stodolski breached duties owed to her opponent and to the Court by failing to comply with rules of the Court relative to non-hypothecation of client assets and relative to discovery.

With respect to the second and third prongs of the analysis, there is some element of knowing misconduct in connection with Ms. Stodolski's disregard of the Court's aforesaid standing order. It is worth noting that the Committee gave less weight than the parties to the assertion that Ms. Stodolski's failures, for the most part, were merely the product of negligence.

There was also potential harm caused by Ms. Stodolski's conduct: the dissipation of a significant marital asset to the detriment of both parties to the divorce proceeding.

For a determination of a baseline sanction, the *Standards* offer appropriate guidance.

Section 4.5 of the *Standards* (Lack of Competence) provides, in pertinent part, as follows:

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 [Public Censure] 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 [Reprimand] 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.

Section 6.2 of the *Standards* (Abuse of the Legal Process) provides, in pertinent part, as follows:

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6.23 Reprimand [Public Censure] 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.

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

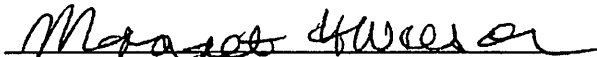
The Committee agreed under the circumstances, that the baseline sanction in this case is appropriately set at a public censure.

Under the fourth prong of the analysis, this baseline sanction must be viewed in light of any aggravating and mitigating factors. In this case, an aggravating factor was Ms. Stodolski's extensive experience in the practice of law, with particular focus in the area of domestic relations litigation. Ms. Stodolski has a prior disciplinary record, but the Committee agreed that the two cases of misconduct (1989: failure to keep her client informed and lack of diligence; 1983: improper notarization of a client's signature) were too remote to be considered. More recently, in October 2005, a complaint against Ms. Stodolski was dismissed with a warning to use more care in her accounting and in her representations to the court and parties regarding legal fees due from a litigation opponent. The Committee recognized that a significant mitigator in this case was Ms. Stodolski's genuine remorse, combined with her fully cooperative attitude and willingness to acknowledge and accept responsibility for her misconduct.

IV. CONCLUSION

Upon consideration of the above factors, the Committee voted to accept the Stipulation as to the sanction, and hereby issues a Public Censure. Finally, the Committee voted that Ms. Stodolski be assessed the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter, as stipulated.

November 23, 2009


Margaret H. Nelson
Chair

Distribution:

James L. Kruse, Assistant Disciplinary Counsel
Janina Stodolski, Esquire
File