

New Hampshire Supreme Court
Professional Conduct Committee

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Bernard, Nina H. advs. Diane C. Junicke-Davis # 06 - 034

REPRIMAND

On December 9, 2008, the Professional Conduct Committee heard oral arguments in the above-referenced matter. Landya B. McCafferty, Disciplinary Counsel, appeared for the Attorney Discipline Office. Respondent appeared on her own behalf.

Members of the Committee present included: Margaret H. Nelson, Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Marilyn B. McNamara, Gerald A. Daley, Richard H. Darling, David N. Cole, James R. Martin. Susan Chollet abstained from the vote.

Having reviewed the record, including the Notice of Charges, Answer, Proposed Findings, Transcript of the October 22, 2008, hearing before the Hearing Panel, and Hearing Panel Report, the Professional Conduct Committee makes factual findings and rulings as detailed below:

I. FINDINGS OF FACT

The Professional Conduct Committee has determined that the record supports the following factual findings of the Hearing Panel, by clear and convincing evidence:

1. Ms. Nina Schumann is an attorney licensed to practice law in New Hampshire. Ms. Schumann was admitted to practice in 1985. At all times material to this proceeding, Ms. Schumann operated her law office as Law Office of H. Nina

Bernard, 25 Hampton Road, Exeter, New Hampshire 03833, and operated under the name H. Nina Bernard.

2. For the purpose of this case, Ms. Schumann is referred to as Ms. Bernard, her name at all times relevant to this attorney discipline proceeding.
3. Ms. Bernard represented Diane C. Junicke-Davis in a post-divorce, custodial matter from July 2003 until October 2004. The matter was then pending in the Family Division at Brentwood and was entitled "In the Matter of Diane C. Davis and Hugh H. Davis (docket #1997-M-0399)."
4. Ms. Bernard and Ms. Davis entered into a fee agreement dated June 26, 2003.
5. Ms. Davis is the Complainant in this attorney discipline case.
6. Prior to retaining Ms. Bernard, Ms. Davis's divorce had been finalized by a Final Decree of Divorce dated December 6, 2000. Paragraph 17 of the Divorce Decree awarded the marital home to Ms. Davis's ex-husband, Mr. Davis as follows:

[Mr. Davis] shall be awarded the marital homestead subject to any and all payments thereon. By agreement of the parties, the marital home has no equity. [Mr. Davis] shall make a good faith effort to have the property refinanced each and every year within five (5) years of the surrender of the IRS indebtedness. If the property is refinanced within five (5) years, the property shall be sold. [Mr. Davis] shall be awarded all proceeds from the sale. He shall be responsible for all costs that have been and will be associated with the home. He shall save, hold harmless and indemnify [Ms. Davis] from all responsibility regarding the home.

7. The Decree was dated February 8, 2000, but Mr. Davis appealed the Decree to the Supreme Court. The Court's Order affirming the Decree was dated December 6, 2000.
8. While Ms. Bernard was representing Ms. Davis, Mr. Davis's attorney, Keri J. Marshall, Esquire, wrote a letter dated August 4, 2004, to Ms. Bernard, enclosing a Quitclaim Deed for the purpose of conveying the marital homestead to Mr. Davis for Ms. Davis's signature.
9. Ms. Bernard advised Ms. Davis not to sign the Quitclaim Deed. Ms. Bernard advised Ms. Davis to wait until after a pending hearing on financial matters, which was scheduled in her case for November 9, 2004, to decide whether to sign the Quitclaim Deed.
10. On or about October 8, 2004, Ms. Davis terminated [sic] Ms. Bernard. Ms. Davis hired Mark P. Cornell, Esquire, to represent her.
11. Shortly thereafter, Ms. Davis requested her file from Ms. Bernard.
12. The file was voluminous. Before turning over the file to Ms. Davis, Ms. Bernard took the file to Top Copy in Exeter on October 10, 2004, to be copied.
13. Because Top Copy informed Ms. Bernard that it would take more than one week to copy the entire file, Ms. Bernard requested that Top Copy expedite the copying of the portions of the file containing pleadings and correspondence.
14. On October 12, 2004, Mr. Cornell spoke with Ms. Bernard on the telephone. During that conversation, Ms. Bernard made it clear to Mr. Cornell that she would not release the file to Ms. Davis unless Mr. Cornell personally guaranteed the payment of copying fees.

15. While talking with Ms. Bernard on the telephone, Mr. Cornell typed a letter memorializing his agreement and faxed it to Ms. Bernard. That letter stated:

As per your request, please accept this letter as my personal guarantee to pay for the copying costs for Dianne [sic] Davis's [sic] file. Please let me know when the copies have been made so Dianne [sic] can pick up her file.

Mr. Cornell's letter is not dated.

16. Mr. Cornell needed the file as he was preparing for the financial hearing in Ms. Davis's case that was scheduled for November 9, 2004.
17. Ms. Bernard withdrew from Ms. Davis's case on October 13, 2004.
18. Ms. Bernard sent Ms. Davis a letter dated October 13, 2004, in which Ms. Bernard requested that Ms. Davis pay for the costs of copying Ms. Davis's file.
19. The fee agreement between Ms. Bernard and Ms. Davis did not contain any specific reference to Ms. Davis's paying for expenses associated with the copying of her file.
20. After receiving Mr. Cornell's guarantee of payment for copying costs, Ms. Bernard permitted Ms. Davis to retrieve the file.
21. In a letter to Mr. Cornell dated October 21, 2004, Ms. Bernard wrote:

The copies of the correspondence and pleadings files are ready for Diane to pick up. I have let her know this. The fee from Top Copy for this portion of the copying is \$342.50. Please discuss with Diane how this is to be paid.

I will keep you updated as I know of the costs and ultimately provide you with an invoice when I have the final cost.

Please feel free to contact me with any questions you may have.

22. On November 8, 2004, the day before the financial hearing, Ms. Bernard filed in Rockingham County Superior Court a lawsuit against Ms. Davis for unpaid legal fees. At the same time, Ms. Bernard also filed a pleading entitled "Petition for Ex-Parte Attachment," seeking an attachment on the Davis's marital homestead.
23. Ms. Bernard's Petition for Ex-Parte Attachment states as follows:

- A. The Plaintiff certifies the following facts to establish probable cause of the right to recover, and the amount thereof:

The Plaintiff and Defendant entered into a fee agreement on June 26, 2003 wherein the Defendant agreed to pay the Plaintiff for legal services rendered to her in connection with Case No. 1997-M-0399, *In the Matter of Diane C. Davis and Hugh H. Davis*, in the Family Division at Brentwood. The Plaintiff provided professional legal services to the Defendant over sixteen months. The Plaintiff provided itemized invoices to the Defendant for legal services over the sixteen month period. The total amount billed to the Defendant was \$61,118.27. The Defendant paid some invoices in full. The Defendant agreed to make regular payments on the balance due. The Defendant made six partial payments. The last payment was received on October 16, 2004. The total amount paid by the Defendant was \$20,377. The Defendant presently owes the Plaintiff \$40,741.27. There is a substantial likelihood that the Plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment requested.

- B. The Plaintiff asserts that such an attachment is justified on the following grounds:

Plaintiff is informed and believes that the Defendant's interest in the real property at 190 Main Street, Kingston, New Hampshire is the only asset of the Defendant. The Defendant and her former husband, Hugh Davis, are the record owners of the real estate. The Plaintiff is further informed and believes that the real estate may be sold or transferred as a result of litigation between the Defendant and her former husband, Hugh Davis, pending in the Family Division at Brentwood, *In the Matter of Diane C. Davis and Hugh H. Davis*, Case No. 1997-M-0399. A hearing is scheduled in this matter on November 9, 2003 [sic] in the Brentwood Family Division. The Defendant has been out of work since September 2004.

24. On November 8, 2004, the Court granted Ms. Bernard's Petition for Ex-Parte Attachment.

II. RULINGS OF LAW

The Professional Conduct Committee concludes that there is clear and convincing evidence Respondent violated the following Rules of Professional Conduct: Rule 1.16(d): Return of Client's File; Rule 3.3(d): Candor Toward the Tribunal, and Rule 8.4(a): Misconduct.

III. ANALYSIS

As a preliminary matter, Respondent alleges that the Hearing Panel Chair abused his discretion and thus deprived her of due process by allowing two attorneys to testify. Respondent argues that the lawyers gave expert testimony and that while they were identified as witnesses by Disciplinary Counsel, the subject of their alleged expert testimony was not identified in accordance with Rule 37AIII(b)(5)(iv) and (6) of the Rules of Professional Conduct. The attorneys were Mr. Cornell who replaced Ms. Bernard as Ms. Davis' counsel and corresponded with Ms. Bernard in attempting to get Ms. Davis' file, and the second witness was Ms. Marshall, Mr. Davis' attorney in the earlier divorce action.

Ms. Bernard argues that the fact that attorneys testified before the Hearing Panel which included some lay members, gave their testimony great weight and that they were permitted to

give expert opinion evidence. The Committee has carefully reviewed the record and has concluded that the Hearing Panel Chair did not abuse his discretion, that the strict rules of evidence applicable in judicial proceedings do not apply in hearings before the Hearing Panel, that the witnesses' testimony was primarily, if not entirely fact testimony, and that any error was harmless. Ms. Bernard had a full opportunity to be heard and to present her case and her due process rights were not violated.

Although New Hampshire has not adopted the American Bar Association's Standards for Imposing Lawyer Sanctions (2005) (*Standards*), we look to them for guidance. *Coddington's Case*, 155 N.H. 66 at 68 (2007). The *Standards* list the following factors to be considered in imposing sanctions: (a) the duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. *Standards, supra* §3.0; *Coddington's Case*, 155 N.H. at 71. In applying these factors, we first categorize the respondent's misconduct and then identify the appropriate sanction. *Coddington's Case*. 155 N.H. at 71. We then consider the effect of any aggravating or mitigating factors on the ultimate sanction. *Id.*

Here the Respondent's conduct involves, inter alia, her violation of Rule 1.16(d) by failing to surrender papers to which the client was entitled. Shortly after Ms. Bernard's representation was terminated by her client, Ms. Davis requested her file from Ms. Bernard. PCC 10 ¶¶ 10-11, *supra*. Ms. Davis' replacement counsel, Mr. Cornell, telephoned Ms. Bernard about the file, but Ms. Bernard made it clear that she would not release the file unless Mr. Cornell personally guaranteed payment of copying costs. Finding 14 *supra*. While talking on the telephone Mr. Cornell typed a letter and faxed it to Ms. Bernard stating in part: "please accept this as my personal guarantee to pay for the copying costs of "Ms. Davis' file." Finding 15, *supra*. PCC 8, Exh. 7. On the day Ms. Bernard withdrew from the case, she sent Ms. Davis a letter requesting that Ms. Davis pay the costs for copying the file. Finding 18, *supra*. A week later, Ms. Bernard wrote a letter to Mr. Cornell stating: "The copies of the correspondence and pleadings files are ready for [Ms. Davis] to pick up. I have let her know this. The fee from Top Copy for this portion of the copying is \$342.50. Please discuss with [Ms. Davis] how this is to be

paid.” Finding 21, *supra*. On November 29, 2004, Ms. Bernard faxed a letter to Mr. Cornell stating in part: “Enclosed please find a copy of your letter, faxed to this office on October 12, 2004, wherein you issued your personal guarantee for payment of the copying fees of Diane Davis’ file. This office relied upon your personal guarantee and requested that the file be copied by Top Copy....” PCC 9, Exh. 21. At the hearing before the Hearing Panel, Ms. Bernard took the position that she had not demanded payment of the copying costs before releasing the file; however, Mr. Cornell testified in response to the following question: “Did you get the impression after that [phone] conversation [with Ms. Bernard] that if you hadn’t guaranteed payment, you wouldn’t get the file? Answer: Absolutely.” PCC 11, Hearing Panel transcript, October 22, 2008, p. 67, ll. 2-5. By letter dated January 31, 2005, Mr. Cornell repeated to Ms. Bernard: “I must disagree with your statement that you never told [Ms. Davis] that she could not have possession of her file. I had to guaranty that I would pay for the copies of the file if [Ms. Davis] did not before you would release it. If [Ms. Davis] had been free to take her file, I would not have needed to make that guaranty.” PCC 8, Exh. 16.

It is demonstrated by clear and convincing evidence that Ms. Bernard violated Rule 1.16(d) by failing and refusing to provide Ms. Davis with her file without demanding payment for copying the file.

Respondent also violated Rule 3.3(d) by not being candid with the Court. On November 8, 2004, Ms. Bernard filed a lawsuit against Ms. Davis for unpaid legal fees and sought an ex-parte attachment of the Davis’ marital homestead. Finding 22. On that same date, the Court granted the ex-parte attachment. Finding 24. At the time Ms. Bernard filed and obtained the ex-parte attachment, she knew, but did not disclose to the Court, the following material facts: (1) Ms. Davis’ interest in the property, if any, was the subject of another Court’s Order of December 6, 2000, awarding the entire homestead property to Ms. Davis’ former husband, Mr. Davis; and (2) that Mr. and Mrs. Davis had stipulated in the divorce proceeding that there was no equity in the property. Finding 6, *supra*.

The above facts demonstrate by clear and convincing evidence that Ms. Bernard withheld

material facts from the Court and thus violated Rule 3.3 (d).

As a result of violating Rules 1.16(d) and 3.3(d), Ms. Bernard violated Rule 8.4(a).

IV. SANCTION

Having made the aforementioned findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter is a Reprimand. 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). This sanction is also in accord with the ABA Center for Professional Responsibility, *Standards for Imposing Lawyer Sanctions* (1991). *See, 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).

Although Ms. Bernard maintains that she did not condition return of Ms. Davis' file upon payment of the copying costs, the evidence is overwhelming that she did just that. It is understandable that Ms. Bernard felt entitled to recover the copying costs since she also felt that Ms. Davis owed her approximately forty thousand dollars in attorney's fees. However, the fact remains that Ms. Davis was entitled to have her file returned to her promptly without having to pay for it. As a result, Ms. Bernard violated Rule 1.16(d).

Ms. Bernard also violated Rule 3.3(d) by failing to disclose to the Court that the marital property which was the subject of her ex-parte attachment had previously been awarded by another court to Mr. Davis and that the parties had stipulated that there was no equity in the property. Nevertheless, Ms. Bernard believed that her former client, Ms. Davis had an equitable interest in the marital property which could be attached to satisfy her legal bill. As a result, Ms. Bernard violated rule 3.3(d).

In determining the appropriate sanction we look to the *Standards*. The *Standards* provide:

- Section 6.12 that suspension is generally appropriate when a lawyer knows that material information is improperly being withheld from the court and causes injury or potential injury to an adverse party or causes a potentially adverse effect on the legal proceeding.
- Section 6.13 provides that a public censure is generally appropriate when a lawyer is negligent when failing to disclose material information to the court and causes injury or potential injury to a party or the legal proceeding.
- Section 6.14 provides that a reprimand is generally appropriate when a lawyer engages in an isolated instance of neglect in failing to disclose material information to the court and causes little or no actual or potential injury to a party or the legal proceeding.

Here there was little if any injury to the adverse party; indeed Ms. Davis did not object to the ex-parte attachment after it was issued. While Ms. Bernard's failure to disclose material facts to the Court is very troublesome, there was little resulting harm to the judicial proceeding.

Section 4.14 provides that a Reprimand is generally appropriate where a lawyer deals negligently with a client's property and causes little or no harm to the client. Ms. Bernard, while denying that she conditioned the return of the file upon payment of the copying costs, apparently believed that she was entitled to recover those costs before returning the file.

We next turn to aggravating and mitigating factors. As an aggravating factor, Ms. Bernard received a Reprimand in 2007 as a result of her holding herself out as a member of a firm whereas, in reality, she was a sole practitioner. In mitigation, Ms. Bernard apparently had a belief that Ms. Davis had an equitable interest in the marital property which she attached and therefore need not have disclosed the prior award of the property to Mr. Davis.

Based on all of the foregoing, the Committee determines that a Reprimand is the

appropriate sanction for these violations.

V. COSTS

Respondent is assessed all costs associated with the investigation and prosecution of this matter.

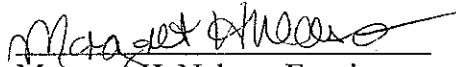
VI. CONCLUSION

For all of the above reasons, the Professional Conduct Committee issues a Reprimand to Respondent for violating N.H. R. Prof. Conduct, Rules 1.16(d); 3.3(d) and 8.4(a).

VII. 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).

February 17, 2009


Margaret H. Nelson, Esquire
Chair

c.c. Landya B. McCafferty, Disciplinary Counsel
H. Nina Bernard, Esquire
File