

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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*
Julie A. Introcaso
James R. Martin
Jennifer L. Parent
* non attorney member
Holly B. Fazzino, Admin. Coordinator

Earnshaw, Kathleen A. advs. Attorney Discipline Office # 09-005

REPRIMAND

On April 20, 2010, the Professional Conduct Committee deliberated the above-captioned matter. Members present included: Margaret H. Nelson, Chair; Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, Julie A. Introcaso, James R. Martin and Jennifer L. Parent. David N. Cole was absent.

The Committee grants the parties Joint Motion to Waive Notice of Charges and Hearings Committee Process.

I. FINDINGS OF FACT

The Respondent and the ADO have stipulated, and the Committee accepts the 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:

1. Kathleen M. Earnshaw, Esquire, is a New Hampshire attorney who was admitted to the New Hampshire Bar in 1992.
2. Since July of 2004, Ms. Earnshaw has maintained an office at 35 East Pearl Street, Nashua, New Hampshire 03060. At all times material to this proceeding, Ms. Earnshaw owned and operated her law office as a sole practitioner. She also employed non-lawyer assistants, including Leslie-Ann Smith.

3. As of February of 2009, Ms. Smith had been Ms. Earnshaw's legal assistant/secretary for almost 11 years. During that time, Ms. Earnshaw occasionally socialized with Ms. Smith and trusted her completely.
4. In 2001, Ms. Earnshaw was appointed Power of Attorney by Paul Plante for the purpose of paying Mr. Plante's bills from his personal checking account.
5. In 2001, Mr. Plante was about 60 years old and had physical limitations caused by a stroke. He was living in a Nashua nursing home where he still resides.
6. Ms. Earnshaw had opened a personal checking account for Mr. Plante at what was then TD Banknorth. Funds were deposited into the checking account from Mr. Plante's investment and savings accounts.
7. Over a prolonged period of employment, Ms. Smith never gave Ms. Earnshaw any indication that Ms. Smith would ever violate the trust placed in her.
8. With respect to Mr. Plante, Ms. Smith collected bills, arranged for payment, maintained records and brought checks and bills to Ms. Earnshaw who reviewed and signed the checks.
9. No checks could be written without the bill attached. Ms. Smith mailed the checks to creditors.
10. Ms. Smith maintained a check register on a Quicken program on her computer. She reconciled the checking account and Ms. Earnshaw reviewed the reconciliation.
11. Over the last year of her employment, Ms. Smith fell behind on her reconciliations but Ms. Earnshaw reviewed the check register to be sure that there were enough funds to pay Mr. Plante's bills.
12. The check register entries were not atypical. During this time, Ms. Earnshaw did not review the bank statements on a regular basis.
13. On February 18, 2009, Ms. Earnshaw heard a voicemail from the billing department at Mr. Plante's nursing home stating that Mr. Plante was behind in his bill.
14. Ms. Earnshaw asked Ms. Smith for the recent statements on Mr. Plante's account but Ms. Smith handed her only one or two and had trouble finding more. The statements shown to Ms. Earnshaw were partially whited out.
15. Ms. Earnshaw went to the bank and ordered statements for the past year. Returning to her office, Ms. Smith was gone and her keys were on her desk.

16. On Friday, February 20, 2009, Ms. Smith left a voicemail that she was sorry but did not say why she was sorry.
17. On the same date, Ms. Earnshaw went back to the bank and ordered copies of all checks on Mr. Plante's account back to January of 2008.
18. During a telephone call on Saturday, February 21, 2009, Ms. Smith confessed that she had signed Ms. Earnshaw's name to Mr. Plante's checks. She said she had taken about \$5,000.
19. The following Monday, Ms. Earnshaw went back to the bank and reviewed cancelled checks for the past year. There were several checks on which Ms. Smith had forged Ms. Earnshaw's name.
20. At that point, Ms. Earnshaw closed Mr. Plante's account and opened a new account at the same bank. Ms. Earnshaw ordered checks back through January of 2007 and found more forged checks.
21. On February 24, 2009 Ms. Earnshaw met with Mr. Plante, with one of his relatives present, and explained the theft.
22. Also on February 24, 2009, Ms. Earnshaw reported the matter to the Attorney Discipline Office in a letter of that same date. She also reported meeting with a Nashua Police Department detective on that date.
23. Ms. Earnshaw notified her malpractice carrier and began gathering all financial records relating to Mr. Plante's account. In that process, more and more forged checks were discovered.
24. The amount stolen appeared to be about \$134,000, all from Mr. Plante's account.
25. Before the total amount had been determined, Ms. Smith's mother asked how much had been taken. At that point, Ms. Earnshaw said she knew of \$75,000. Ms. Smith's mother sent her two checks totaling \$75,000 which Ms. Earnshaw deposited in Mr. Plante's account upon receipt.
26. Ms. Earnshaw paid Mr. Plante's nursing home bill, explained the delay was no fault of Mr. Plante, and a previously assessed late fee was eliminated.
27. Ms. Earnshaw's insurance carrier arranged for a certified public accountant to do an audit. The auditor was John Schiffman from Schiffman, Paul & Dottilio, P.C.
28. At Ms. Earnshaw's urging, Mr. Plante retained new counsel at the beginning of April 2009.

29. Because some of the checks were mailed out of state, the criminal investigation was turned over to the Secret Service and a federal prosecutor. Ms. Smith confessed to the Secret Service investigator.
30. Mr. Schiffman's audit report is dated May 18, 2009. In the auditor's opinion, the amount taken was \$134,071.35. The report details why it was possible for the thefts to occur and discusses correction of existing procedures.
31. In his report, Mr. Schiffman noted:

In order to achieve this goal, Kate Earnshaw has personally assumed all of the clerical and control responsibilities involved in maintaining the Paul Plante agency account. Since she is currently performing all the functions that Leslie Smith previously performed, it is believed that future thefts can not occur. Both she and Plante are victims of Smith's alleged criminal activity. Based on my inquiries adequate steps have been taken to remedy the situation because Earnshaw will be directly responsible for all financial activity in the Plante Agency account.
32. Thereafter, Craig A. Calaman, auditor for the Attorney Discipline Office, performed an agreed upon audit of Ms. Earnshaw's client trust accounts and fiduciary account.
33. Mr. Calaman found that Ms. Earnshaw maintains her client trust accounts in compliance with New Hampshire Supreme Court Rule 50; and she "has implemented reasonable internal controls over her operating accounts." A copy of Mr. Calaman's audit report is attached.
34. Deficiencies have been found to be isolated to the Paul Plante accounts.
35. Ms. Earnshaw delegated the tasks regarding the maintenance and handling of Mr. Plante's accounts and did not implement safeguards similar to those which were in place for her other accounts.

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 5.3(a) and (b) Responsibilities Regarding Non-Lawyer Assistants

36. Ms. Earnshaw, as a sole practitioner, manager, and owner of her law practice, was required to make reasonable efforts to ensure that her firm had in effect measures giving

reasonable assurance that the conduct of her non-lawyer assistant was compatible with Ms. Earnshaw's professional obligations as a lawyer.

37. Having direct supervisory authority over her non-lawyer assistant, Ms. Earnshaw was also required to make reasonable efforts to ensure that the conduct of such non-lawyer assistant was compatible with Ms. Earnshaw's professional obligations as a lawyer.
38. Ms. Earnshaw failed to comply with the aforementioned requirements, as follows:
 - a) Ms. Earnshaw did not properly supervise Ms. Smith's handlings of the Paul Plante accounts;
 - b) Ms. Earnshaw did not review the actual bank statements or other source documents relating to the accounts;
 - c) Ms. Earnshaw felt that it was adequate that she was the only one with signatory power on the accounts, and
 - d) Ms. Earnshaw would review a reconciliation statement prepared by Ms. Smith. When Ms. Smith fell behind on preparing the reconciliations, Ms. Earnshaw occasionally reviewed the check register which was maintained by Ms. Smith.

Rule 8.4(a): General Rule

39. Having found the foregoing violations, there is clear and convincing evidence that Ms. Earnshaw's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

III. ANALYSIS

The Committee agreed, consistent with the stipulated recommendation, that the appropriate sanction in this matter is a Reprimand. Both case law in New Hampshire and the *American Bar Association's Standards for Imposing Lawyer Sanctions* (2005) ("Standards") support the Committee's conclusion. Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner's Case*, 158 N.H. 299, 303 (2009). 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. Once the baseline sanction is determined, the Court then looks to the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.*

The Committee found, consistent with the Stipulation, that the Respondent violated

duties owed to her client, the legal profession, and the Court. The Respondent violated duties owed to Paul Plante as well as to the legal profession, by failing to make reasonable efforts to ensure that the conduct of her non-lawyer assistant was compatible with her professional obligations as an attorney.

The Respondent's breaches were negligent.

The actual harm caused to Mr. Plante was the misappropriation of \$134,071.75 from his accounts.

Section 4.1 of the *Standards* provides, in pertinent part, as follows:

4:13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.¹

The Respondent has significant experience in the practice of law, an aggravating factor. Ms. Earnshaw has: no prior record; no dishonest or selfish motive; took immediate steps to self-report the matter to her client, the Nashua Police and the ADO; assisted her client in securing new counsel; her client was fully reimbursed, and exhibited remorse for her lack of supervision of her assistance and the consequences there from.

The Committee concurs with the parties that the weight of the many mitigating factors justify a reduction in the sanction from a Public Censure to a Reprimand.

IV. SANCTION

For all of the above reasons, the Committee hereby issues a Reprimand to Kathleen A. Earnshaw, for violations of N.H. Rules Prof. Conduct 5.3(a), 5.3(b) and 8.4(a).

V. COSTS

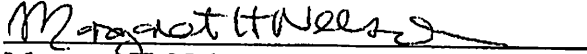
The parties have stipulated, and the Committee approves, that the Respondent will pay all costs associated with the investigation and prosecution of this matter.

¹ The New Hampshire equivalent of a reprimand under the Standards is a public censure, and an admonition under the Standards is a reprimand under New Hampshire law.

VI. RIGHT TO APPEAL

Pursuant to Supreme Court Rule 37(A)(III)(d)(2)(D)(4)(A), the Respondent has the right to appeal to the New Hampshire Supreme Court. See also Supreme Court Rule 37(3)(c), last paragraph.

June 8, 2010


Margaret H. Nelson
Chair

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