

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Bownes, David H. advs. Roland Paul Fleury # 09-026

PUBLIC CENSURE

On July 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; David N. Cole; Gerald A. Daley; Julie A. Introcaso; James R. Martin and Jennifer L. Parent. Alan J. Cronheim was recused. Thomas P. Connair and Richard H. Darling were absent.

I. FINDINGS OF FACT

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

1. The Respondent, David H. Bownes, Esq., is a New Hampshire attorney who was admitted to the New Hampshire Bar in 1982. At all times material to this proceeding, Mr. Bownes operated a law office at 486 Union Avenue, Laconia, New Hampshire. Mr. Bownes's office is presently located at 20 Canal Street, Laconia, New Hampshire.
2. The subject disciplinary proceeding was initiated by a complaint filed with the ADO on June 26, 2009, by Roland P. Fleury. Mr. Fleury alleged that Mr. Bownes violated the New Hampshire Rules of Professional Conduct in connection with his representation of Mr. Fleury while Mr. Fleury was in the custody of the New Hampshire Department of Corrections.

3. At all times material to this proceeding, Mr. Fleury was a resident of the Northern New Hampshire Correctional Facility in Berlin, New Hampshire. Mr. Fleury currently resides at 80 Lowell Street, Manchester, New Hampshire.
4. On January 10, 2005, Mr. Fleury was a passenger in a police van operated by the Hillsborough County Sheriff's Department. Mr. Fleury was being transported back to prison after a court appearance at the Hillsborough County Superior Court in Manchester. Mr. Fleury claimed to have sustained injuries when the van braked suddenly to avoid a collision. According to Mr. Fleury, he was shackled, but not seat-belted, and was thrown against the side of the van.
5. On or about January 13, 2005, Mr. Fleury's parents met with Mr. Bownes about pursuing a personal injury claim on behalf of Mr. Fleury. Mrs. Fleury provided Mr. Bownes with a description of the accident, as well as Mr. Fleury's medical symptoms.
6. Mr. Bownes agreed to represent Mr. Fleury and to handle the matter on a contingency fee basis.
7. Mr. Fleury corresponded with Mr. Bownes during the period January to June 2005, describing the accident and his medical condition.
8. On May 16, 2005, the prison issued a medical restriction pass addressing limitations in Mr. Fleury's physical activity due to cervical pain. On May 27, 2005, Mr. Fleury was referred for medical consultation with a specialist and a CT scan.
9. Mr. Bownes obtained medical records releases from Mr. Fleury and used them to obtain copies of medical records from the Androscoggin Valley Hospital and the New Hampshire Department of Corrections. By August 2005, Mr. Bownes had received all relevant medical records pertaining to Mr. Fleury's condition. According to Mr. Fleury, no additional medical records were generated after that time.
10. Mr. Fleury's medical records reflected that, shortly after the accident, Mr. Fleury complained of pain in his neck, tingling in his hands, headaches, and dizziness. Mr. Fleury underwent an x-ray of the cervical spine and later a CT scan of the same area, revealing evidence of a prior injury sustained in 1994. According to a neurological consult conducted in June 2005 in conjunction with the CT scan, the recent "whiplash-type injury" aggravated the underlying condition. Mr. Fleury was referred for physical therapy.
11. After corresponding with the Manchester Police Department and the Hillsborough County Sheriff's Department, Mr. Bownes obtained an accident report in February 2007.

12. Mr. Bownes reviewed the medical and other information he obtained and decided in or about November 2007 to close Mr. Fleury's file. Mr. Bownes determined that there was not sufficient evidence that Mr. Fleury sustained injuries caused by the January 10, 2005, accident for which he could recover, and that pursuit of the matter on a contingency fee basis would not be in the best interests of his office. Mr. Bownes did not make or maintain a record of his determination to close the file.
13. Mr. Bownes did not advise Mr. Fleury of his assessment of the case or his decision to close the file.
14. By letter dated December 5, 2007, Mr. Fleury wrote to Mr. Bownes requesting a status report on the case. Mr. Bownes received Mr. Fleury's letter on December 7, 2007, but did not respond.
15. The statute of limitations applicable to Mr. Fleury's claim expired in January 2008.
16. By letter dated March 8, 2009, Mr. Fleury wrote to Mr. Bownes requesting a status report on the case. Mr. Fleury expressed his hope that the statute of limitations had not expired on his claim.
17. On June 15, 2009, Mr. Bownes wrote to Mr. Fleury and apologized for the delay in responding to Mr. Fleury's March 8, 2009, letter. Mr. Bownes acknowledged that he had also received Mr. Fleury's letter dated December 5, 2007.
18. In his letter of June 15, 2009, to Mr. Fleury, Mr. Bownes acknowledged that he should have sent Mr. Fleury a letter advising him of the decision to close the file. Mr. Bownes further advised that the three-year statute of limitations applicable to Mr. Fleury's claim expired in January 2008.

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 the following violations by clear and convincing evidence:

Rule 1.3: Diligence

19. Mr. Bownes had a duty to act with reasonable promptness and diligence in representing Mr. Fleury, and to provide such representation with no avoidable harm to Mr. Fleury's interests or the attorney-client relationship.

20. Mr. Bownes breached said duty by failing to handle Mr. Fleury's claim, or otherwise dispose of the matter, in a prompt and timely manner prior to expiration of the applicable statute of limitations.
21. Mr. Bownes's aforesaid breach effectively extinguished Mr. Fleury's claim, causing a harm that could have been avoided by Mr. Bownes.
22. Mr. Bownes's aforesaid breach also caused the termination of his attorney-client relationship with Mr. Fleury.

Rule 1.4: Client Communications

23. Mr. Bownes had a duty to keep Mr. Fleury reasonably informed regarding the status of his claim and to promptly comply with Mr. Fleury's reasonable requests for information. Mr. Bownes also had a duty to explain the legal and practical aspects of the matter he was handling for Mr. Fleury so as to permit Mr. Fleury to make informed decisions regarding his case and the representation.
24. Mr. Bownes breached said duties by the following:
 - a. failing to respond in a timely fashion to Mr. Fleury's requests for updates on the status of his case;
 - b. failing to inform Mr. Fleury in a timely fashion of his assessment of the claim and the prospects of recovery;
 - c. failing to inform Mr. Fleury in a timely fashion of his determination not to pursue a claim on Mr. Fleury's behalf; and
 - d. failing to advise Mr. Fleury in a timely fashion regarding alternative courses of action that might be pursued in order to protect Mr. Fleury's interests.

Rule 8.4(a): General Rule

25. Having found the foregoing violations, there is clear and convincing evidence that Mr. Bownes's conduct, as described herein, violated Rule 8.4(a).

III. ANALYSIS

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 *ABA Standards for Imposing Lawyer Sanctions* (“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. 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. *Id.*

Under the first prong of the analysis, Mr. Bownes violated both his duty to act with reasonable diligence in assessing and handling Mr. Fleury’s personal injury claim and his duty to communicate with Mr. Fleury about his assessment and handling of the claim. With respect to the second prong of the sanction analysis, the Committee believes Mr. Bownes’s conduct was the product of negligence, rather than any intentional act or willful purpose. As to the third prong of the analysis, Mr. Bownes’s failures caused Mr. Fleury to lose any opportunity to pursue a personal injury claim, however uncertain or modest Mr. Bownes might have considered that claim to be. Mr. Bownes’s conduct also caused harm to his attorney-client relationship with Mr. Fleury.

In conjunction with the foregoing assessment, the *Standards* offer material guidance in determining a baseline sanction. Relevant provisions set forth below appear at *Standards* § 4.4:

Lack of Diligence.

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.
- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
- 4.43 Reprimand¹ 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.
- 4.44 Admonition² is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

The Committee finds that the baseline sanction in this case is a public censure. Mr. Bownes acted negligently and without reasonable diligence, and his conduct caused actual injury to his client.

¹ Section 4.43 uses the term “Reprimand.” The most analogous sanction in New Hampshire is a Public Censure.

² Section 4.44 uses the term “Admonition.” The most analogous sanction in New Hampshire is a Reprimand.

The Committee then looked at factors that might aggravate or mitigate the sanction. Aggravating factors include Mr. Bownes' substantial experience in the practice of law and his prior disciplinary record. Mr. Bownes was issued a Reprimand in 2000 for failing to maintain records of the handling, maintenance and disposition of his client's funds, in violation of Rule 1.15(a)(2). *See Bownes, David H. advs. Carl H. Graf, # 99-013* (Professional Conduct Committee, January 28, 2000). In February 2008 Mr. Bownes received a Warning that he must provide better documentation of his handling of client funds, and that he should more carefully, thoroughly, and effectively communicate with his clients about financial and substantive matters bearing on the representation. *See Bownes, David H. advs. Christopher Downes # 04-098* (Professional Conduct Committee, February 19, 2008). In September 2008 the Complaint Screening Committee issued a Warning to Mr. Bownes about the importance of maintaining adequate and timely communications with his clients. *See Bownes, David H. advs. Donald Naismith, # 08-022* (Complaint Screening Committee, September 12, 2008).

Mitigating factors include the absence of a dishonest or selfish motive and a cooperative attitude toward the disciplinary proceedings.

IV. SANCTION

The parties have stipulated to, and the Committee accepts the Stipulation, that the Respondent receive (1) a Public Censure, and (2) an office practices audit as described below:

- a. Mr. Bownes shall complete mandatory diversion under Rule 37A (I)(g)(4)-(8). Mr. Bownes 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. The consultant must be approved by the ADO before the audit is undertaken.
- b. The focus of such audit shall be on Mr. Bownes'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; and d) calendaring and acting upon deadlines and commitments.

- c. Mr. Bownes 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. Bownes has implemented the consultant's recommendations. Mr. Bownes shall fully implement the consultant's recommendations and show proof of same to the ADO, in the form of a written report submitted by Mr. Bownes under oath, within six months of the order issued in this matter.
- d. At Mr. Bownes's expense, the consultant shall prepare a written report, documenting the results of the audit and Mr. Bownes's response thereto, which report shall be filed with the ADO within nine months of the order issued in this matter.
- e. In the event that Mr. Bownes 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. Bownes 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.

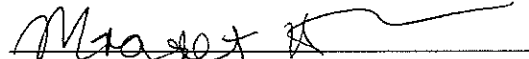
V. CONCLUSION

For all of the above reasons the Committee issues a Public Censure with the requirement for an office practices audit to the Respondent for violating N.H. Prof. Conduct 1.3: Diligence, 1.4: Client Communication and 8.4(a): General Rule.

VI. COSTS

The parties have stipulated, and the Committee accepts the Stipulation, that Mr. Bownes shall reimburse the Committee for all cost associated with the investigation, prosecution, and publication of this matter.

August 30, 2010


Margaret H. Nelson
Chair

Distribution:

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File