

**New Hampshire Supreme Court
Professional Conduct Committee**

a committee of the attorney discipline system

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Maggiotto, Paul A. advs. Kevin Joseph McCaffrey # 09-039

REISSUED PUBLIC CENSURE

On May 18, 2010, the Professional Conduct Committee heard oral argument in the above-referenced matter pursuant to New Hampshire Supreme Court Rule 37A(III)(b)(2). Landya B. McCafferty, Disciplinary Counsel, appeared for the Attorney Discipline Office. Russell F. Hilliard, Esquire appeared on behalf of the Respondent, Paul A. Maggiotto, Esquire. The Professional Conduct Committee included Benette Pizzimenti, Acting Chair, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, Julie A. Introcaso, James R. Martin and Jennifer L. Parent. Margaret H. Nelson, Chair and Susan R. Chollet were absent. Toni M. Gray, Vice Chair was recused from the proceeding and did not participate in the deliberations.

On April 20, 2010, the Committee granted Disciplinary Counsel's Assented to Motion to Permit Waiver of Hearings Committee Process and approved the Stipulation as to the Facts and Rule Violations submitted by the parties. The Committee, having reviewed the record on May 18, 2010 to include Mr. McCaffrey's two-page initial complaint dated August 20, 2009, Attorney Maggiotto's two-page response dated September 30, 2009, the Notice of Charges, the

Stipulation as to Facts, Rules and Sanctions submitted by the parties, Mr. Maggiotto's letter to the Committee dated May 17, 2010, and the oral argument on the issue of sanction, makes factual findings and rulings of law as detailed below.

I. FACTUAL FINDINGS

The parties stipulated to certain factual allegations contained in the Notice of Charges. As a result, upon consideration and review of the Stipulation and the record as a whole, the Professional Conduct Committee, determines that the record supports the following findings of fact by clear and convincing evidence:

1. Mr. Maggiotto is an attorney licensed to practice law in New Hampshire. Mr. Maggiotto was admitted to practice in New York in 1984 and in New Hampshire in 1990. At all times material to this proceeding, Mr. Maggiotto operated his law office as Maggiotto & Belobrow, PLLC, 58 Pleasant Street, Concord, New Hampshire 03301.

2. In October of 2005, [REDACTED] consulted with Mr. Maggiotto about the possibility of divorcing her then-husband, Kevin J. McCaffrey. [REDACTED] decided not to file for divorce at that time.

3. In November 2007, [REDACTED] retained Mr. Maggiotto to represent her in her divorce.

4. [REDACTED] filed a Petition for Divorce on November 15, 2007.

5. Mr. McCaffrey was represented at all relevant times by Jennifer Moore Balkus, Esq.

6. Shortly after [REDACTED] retained Mr. Maggiotto in 2007, they became intimate friends and began a consensual sexual relationship. Their consensual sexual relationship continued throughout Mr. Maggiotto's representation [REDACTED]

7. The First Appearance in the marital case occurred on January 8, 2008 when Mr. Maggiotto appeared with [REDACTED] Mr. McCaffrey appeared without Ms. Balkus, as counsel is not required at a First Appearance.

8. Other than the First Appearance, there were no hearings in the case. There were no contested discovery issues, no custody or alimony disputes, and the parties agreed to a parenting plan and a property distribution without much rancor.

9. Mr. McCaffrey and [REDACTED] have two children.

10. The divorce became final on April 30, 2008.

11. The intimate relationship between Mr. Maggiotto and [REDACTED] lasted until July 2009.

II. RULINGS OF LAW

The Professional Conduct Committee, upon consideration and review of the record, Stipulation, and the facts of this case, finds there exists clear and convincing evidence to support the following rulings of law:

Rule 1.8(j): Sexual Relationship with Client

12. The above factual findings are incorporated by reference.

13. Rule 1.8(j), which became effective on January 1, 2008, provides that a lawyer "shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

14. Mr. Maggiotto and [REDACTED] did not have a consensual sexual relationship at the time their attorney-client relationship commenced. Rather, their intimate relationship began after [REDACTED] retained Mr. Maggiotto in November 2007.

15. Mr. Maggiotto had a duty not to engage in a sexual relationship with [REDACTED] his divorce client.

16. At all relevant times Mr. Maggiotto acted knowingly in his relationship with [REDACTED]

17. Mr. Maggiotto's conduct in this regard constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.8 (j).

Rule 8.4(a): General Rule

18. Because there exists clear and convincing evidence that Mr. Maggiotto violated Rule 1.8(j), there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

III. SANCTION

Having made the above-referenced findings of fact and rulings of law, the Professional Conduct Committee concludes that the appropriate sanction in this matter is a Public Censure.

The Committee recognizes that "the purpose of attorney discipline is not to inflict punishment, but rather to protect the public, maintain public confidence in the Bar, preserve the integrity of the legal profession and prevent similar conduct in the future." *Grew's Case*, 156 N.H. 361, 365 (2007) (quoting *Coddington's Case*, 155 N.H. 66, 68 (2007)).

In reaching our decision, we use the American Bar Association Standards for Imposing Lawyer Sanctions (2005) for guidance. *Coffey's Case* 152 N.H. 503, 513 (2005). Following the *Standards*, we consider "(a) the duty violated; (b) a lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; (d) the existence of aggravating or mitigating factors." *Standards, supra* § 3.0.

In conducting our analysis, the Committee has given significant consideration to the parties' own analysis of the ABA Standards as well as to their joint recommendation that the appropriate discipline in this matter is a reprimand. However, the Committee concludes that in order to assure public confidence in the Bar, it is critically important for a lawyer to avoid commencing a sexual relationship with a client during the course of representation. As a result, given the nature of the conduct in this case, it is our view that a Public Censure is warranted.

In support of our conclusion and in reviewing the *Standards*, we first consider the ethical duty violated by Attorney Maggiotto. As noted in the Stipulation, Rule 1.8(j), the rule related to sexual relations between a lawyer and client, became effective January 1, 2008. Mr. Maggiotto acknowledged his violation of this rule based on his continued involvement with his client after the rule went into effect. Therefore, we determine that Mr. Maggiotto violated his duty to abstain from sexual relations with a client as well as his duty to avoid potential conflicts of interest.

In analyzing the second factor, Mr. Maggiotto's mental state, we agree with the parties that Mr. Maggiotto acted knowingly with respect to his violation.

The third prong of the analysis under the *Standards* requires us to consider the potential or actual injury caused by Mr. Maggiotto's conduct. While there was no actual injury during the pendency of the case, this was in large part due to Mr. Maggiotto's successful effort in assuring that Mr. McCaffrey was unaware of the ongoing relationship. Had Mr. McCaffrey learned of the relationship during the course of the litigation, the impact on the case could have been significant. Therefore, as the parties acknowledge, the potential injury "weighs heavily in any analysis of the baseline sanction in the case." Stipulation ¶ 32.

Having focused on the ethical duty violated, Mr. Maggiotto's mental state, and the issue

of harm or potential harm, we must now determine a baseline sanction. While there is no standard that specifically addresses misconduct under Rule 1.8(j), we again agree with the parties that the most analogous section of the *Standards* is *Standard § 4.3*, the standard referencing misconduct involving conflicts of interest.

Standard § 4.3 provides:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of 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 a 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 Reprimand¹ 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.
- 4.34 Admonition² is generally appropriate when a lawyer engages in an isolated instance of negligence 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 little or no actual or potential injury to a client.

¹ §4.33 uses the term "Reprimand." the most analogous sanction in New Hampshire is Public Censure.

² §4.34 uses the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

We conclude that Standard § 4.33 best describes Mr. Maggiotto's conduct. While Mr. Maggiotto's conduct with his client was "knowing," we believe he did not consider the conflict issue as it related to the domestic case when he continued his relationship with his client. Therefore, he was negligent in failing to consider whether his legal representation would be affected by his own interests and whether his conduct might cause injury or potential injury to his client prior to the conclusion of the case.

In reviewing these factors, we determine that Mr. Maggiotto's violation of Rule 1.8(j) warrants a baseline sanction of a Public Censure.

We next consider the aggravating and mitigating factors present in the case. There is one substantial aggravating factor. Mr. Maggiotto is a lawyer with substantial experience, having practiced law for more than twenty years at that time of these events. He has had a domestic practice in New Hampshire for an extended period of time and is no doubt aware of the vulnerabilities of litigants in domestic cases. While the relationship in question was fully consensual, Mr. Maggiotto failed to consider the potential harm to his client if the relationship had become known during the course of the case. *See Standards* § 9.22(i).

We are also aware of a number of mitigating factors. Mr. Maggiotto has no prior disciplinary record. He has been entirely cooperative with Disciplinary Counsel during the investigation of his case and is respected in the legal community. Further, he has shown an understanding of his conduct and is remorseful for it. Mr. Maggiotto's client is fully supportive of him and has indicated that she believes the relationship neither caused her or her case any harm. *See Standards*, § 9.32(a), (e) and (l).

The Committee notes that Mr. McCaffrey has not expressed a specific view as to what

sanction should be imposed in this case; however, he has indicated that he felt harmed by Mr. Maggiotto's conduct. In contrast, Mr. Maggiotto's client, who was present for the oral argument, supports the imposition of a lenient sanction in this matter.

Balancing the aggravating and mitigating factors as well as the parties' joint recommendation for sanction, the Committee believes a Public Censure is the appropriate sanction in this case. While Mr. Maggiotto raises significant mitigating evidence, the Committee believes that an experienced attorney – hopefully any attorney – would know that it is highly inappropriate to commence a sexual relationship with a client while representing that client – particularly in a domestic case. The risk of substantial impact on a case and on a client is considerable. For lawyers, there are certain basic and obvious rules. One of them is that a lawyer may not start a sexual relationship with a current client. While the Committee acknowledges Mr. Maggiotto's record in New Hampshire as a lawyer and appreciates the service he has provided to the Bar, the Committee concludes that the mitigating factors cannot outweigh the severity of Mr. Maggiotto's conduct.

IV. CONCLUSION

In consideration of the record before the Committee and the factors described above, the Professional Conduct Committee issues a Public Censure in this case. Pursuant to the parties' Stipulation, Mr. Maggiotto is assessed the expenses incurred by the Professional Conduct Committee in the investigation and prosecution of this matter.

September 21, 2010


Benette Pizzimenti, Esquire
Acting Chair

Distribution:

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