

New Hampshire Supreme Court
Professional Conduct Committee

Donald King advs. John K Webb #01-069

Finding of Professional Misconduct
and Recommended Sanction of
One Year Suspension

Introduction

This matter comes before the Professional Conduct Committee following a hearing before a Hearing Panel. Prior to the hearing, Disciplinary Counsel and counsel for the respondent entered into a Stipulation dated as of October 4, 2004 with respect to certain facts and rules violations. The Stipulation did not address all the matters set forth in the Notice of Charges as amended by Order dated November 3, 2004. The parties presented evidence and argument to the Hearing Panel at the hearing conducted on October 12-13, 2004. Following the issuance of the Hearing Panel Report, the parties waived oral argument pursuant to Sup. Ct. R. 37A (III)(d)(B).

On January 18, 2005, the Committee deliberated this matter. Members present included: Margaret H. Nelson, Chair and Reporter, Benette Pizzimenti, Attorney Vice Chair, Toni Gray, Lay Vice Chair, Alan J. Cronheim, James M. Martin, Richard B. McNamara, David N. Page, Stephen Stepanek, David Cole and Thomas P. Connair. Nancy R. Hacking and Gretchen Rule Hamel did not participate.

The Committee thoroughly reviewed the record in this matter which consisted of three volumes of materials, including, among other things, the

Stipulation, transcript of the hearing before the Hearing Panel on October 12-13, 2004, Joint Witness List, the Jointly Submitted Exhibits, submitted under cover of Disciplinary Counsel's letter dated October 5, 2004, Disciplinary Counsel's Proposed Findings of Fact and Rulings of Law and Request for Costs, various pleadings and correspondence between the respondent, his counsel and the Attorney Discipline Office and the Hearing Panel Report dated November 12, 2004.

Having reviewed the record, the Committee has determined that the record supports the following factual findings and rulings of the Hearing Panel by clear and convincing evidence. The factual findings and rulings of law are detailed below:

I. FACTUAL FINDINGS

1. In a sworn letter of complaint dated July 2, 2001, and in supplemental letters thereafter, John K. Webb made allegations of professional misconduct against Donald F. King. See JS Exhs.¹ 1-8.
2. On May 31, 1983, John K. Webb and Ann M. Webb signed their individual Wills, which had been drafted by Attorney Thomas S. Quinn, of Hubbard & Quinn, P.A., in Amherst, New Hampshire. See Stip.² at ¶ 2; JS Exh. 10 at 046-049. At that time, Mr. King was not employed at Hubbard & Quinn, P.A. See Stip. at ¶ 2.
3. On August 27, 1995, Mrs. Webb died. See Stip. at ¶ 3; JS Exh. 10 at 050.

¹ "JS Exh." refers to the "Jointly Submitted Exhibits," a notebook containing 24 exhibits, which has been previously submitted and will be made part of the record at the hearing. With the exception of excerpts from depositions, the page numbers cited refer to the bates-stamp number located at the bottom-right corner of each page.

² "Stip." refers to the parties' Stipulation, filed in this matter on October 1, 2004.

4. On October 16, 1995, Mr. Webb met with Mr. Quinn at the Hubbard & Quinn law office. See Stip. at ¶ 3; JS Exh. 1 at 003, 006.
5. At that meeting, Mr. Quinn and Mr. Webb discussed Mr. Webb's need to gain access to Mrs. Webb's savings funds in GE Mutual Funds. These funds were solely in Mrs. Webb's name. They also discussed the need for Mrs. Webb's estate to go through the probate process and for Mr. Webb to have his Will updated. Mr. King was not present at that meeting. See Stip. at ¶ 4; JS Exh. 1 at 006.
6. More specifically, Mr. Quinn advised Mr. Webb that the action related to the GE Mutual Funds would require a filing in probate court, and that Mr. King would be handling this matter for Mr. Webb. See Stip. at ¶ 5; JS Exh. 1 at 006, 017.

Mr. Webb meets Mr. King

7. Near the end of 1995, Mr. Webb met with Mr. King. At that time, Mr. Webb brought Mr. King numerous personal and financial documents, including the original Wills of both himself and his wife. See JS Exh. 18 at 48-49. He also brought to Mr. King his wife's Death Certificate and documents relevant to the GE Mutual Funds. See Stip. at ¶ 6. Mr. Webb understood these documents to be necessary for Mr. King to file the appropriate probate pleadings with respect to the GE Mutual Funds. See JS Exh. 18 at 48-49.
8. On February 6, 1996, Mr. Webb and his daughter, Barbara Michener, met with Mr. King. See Stip. at ¶ 7. Ms. Michener took notes during that

meeting to record Mr. King's instructions and advice. See JS Exh. 18 at 51-52; Exh. 11 (copy of Ms. Michener's hand-written notes at 079-084) (copy of Ms. Michener's 9/30/04 statement at 215-227).

9. During that meeting, Mr. King asked for a retainer of \$800.00. That retainer amount included not only the probate filing but also future estate planning. Mr. Webb paid that retainer by check that same date. See Stip. at ¶ 7; JS Exh. 12 at 078.

Mr. King delivers Will and Death Certificate: March 8, 1996

10. On March 8, 1996, Mr. King delivered Mrs. Webb's Will and Death Certificate to the Hillsborough County Probate Court (hereinafter referred to as "Probate Court"). See Stip at ¶ 8.
11. Thereafter, in a letter dated March 29, 1996, Mr. King wrote to Jennifer Sullivan of Securities Ownership Services on behalf of Mr. Webb. That letter acknowledges that Mr. King is providing representation for Mr. Webb with respect "to matters arising out of the passing of his wife" That letter further states:

Please be advised that the Will of Ann M. Webb has been filed with the Hillsborough County Probate Court . . . and we are awaiting the issuance of letters testamentary relative to the probate estate. With respect to the transfer of Ms. Webb's individual accounts, pursuant to the terms of her Will, we will provide you with the requested certified copy of Mr. Webb's Appointment as Executor of that Estate as well as any further instructions. . . .

See Stip. at ¶ 9.

Mr. King says “probate complete”: December 2000

12. Shortly thereafter, Mr. Webb made an inquiry to GE regarding the process of transferring Ms. Webb's GE Funds. See JS Exh. 1 at 004; Exh. 18 at 37, 40.
13. By letters dated January 5, 2001, GE responded to Mr. Webb's inquiries. See JS Exh. 13 at 010-011, 214. Notably, one of the GE letters dated January 5, 2001, begins as follows:

Dear Mr. Webb,

The following information is in response to your recent inquiry regarding mutual fund account(s) with GE Mutual Funds.

What is required to transfer the registration of a single account upon the owner's death if the estate is being probated?

.....

- JS Exh. 13 at 214 (emphasis in original). Clearly, therefore, as of January 5, 2001, Mr. Webb had made a “recent inquiry” with GE, and informed GE that the owner's estate was “being probated.” JS Exh. 13 at 214.
14. On that same date, Mr. Webb provided Mr. King with the relevant forms to effectuate the transfer of funds. Mr. Webb understood that Mr. King would assemble the forms for his signature, and Mr. King would then send them to GE. See Stip. at ¶ 11; JS Exh. 1 at 007.
 15. On March 10, 2001, Mr. Webb saw Mr. King at the local grocery store and engaged in conversation with Mr. King about the matter. From that conversation, Mr. Webb became concerned that Mr. King did not seem to

know that there was paperwork that needed to be forwarded to GE. See Stip. at ¶ 12; JS Exh. 1 at 007.

Mr. Webb inquires with Probate Court: March 12, 2001

16. On March 12, 2001, Mr. Webb telephoned the Probate Court to inquire as to the status of his case. See Stip. at ¶ 13. The clerk ("Janet") informed him that there was never a probate filing in his case. According to the clerk, the only documents that the Probate Court had received were the Death Certificate and Will. See JS Exh. 1 at 004, 007; Exh. 18 at 25-26.
17. Mr. Webb went to the Probate Court and reviewed the contents of the Probate Court file. Mr. Webb remembered seeing a copy of the Will, and he remembered it containing a handwritten note in pencil stating, "To be filed." See JS Exh. 1 at 004, 007; Exh. 18 at 80-81.
18. The Probate Court employee further explained to Mr. Webb how to complete the probate and effectuate the transfer of GE Funds himself. She told him the process should take no longer than two weeks. See JS Exh. 1 at 007; Exh. 18 at 25-30.
19. On March 14, 2001, Mr. Webb filed a request to be appointed Executor for Mrs. Webb's Estate. The filing fee was \$130.00, which he paid by check on that date. See JS Exh. 1 at 004, 007.
20. On March 27, 2001, Mr. Webb's Appointment as Executor arrived in the mail. See JS Exh. 1 at 004, 007. Mr. Webb then went to the Probate Court to obtain a certified copy for use with the GE Mutual Fund at a cost

of \$5.00. See Stip. at ¶ 14 (note that date in Stip for this event is 3/14/01); JS Exh. 1 at 004, 007.

21. On March 28, 2001, Mr. Webb signed, notarized, and sent by certified mail the GE application for recovery of the funds. See Stip. at ¶ 15; JS Exh. 1 at 005, 007.
22. On or about April 3, 2001, the first of two installments of funds from Mrs. Webb's account arrived in the mail. The paperwork granting Mr. Webb access to the second installment arrived within a day or two. Thus, the transaction, including the probate filing, took a total of approximately fourteen (14) working days. See Stip. at ¶ 16; JS Exh. 1 at 005, 007.
23. The ease with which Mr. Webb handled his deceased wife's probate matter is not surprising in light of the fact that Mr. Webb was the surviving spouse and sole beneficiary. Currently, the New Hampshire Probate Court website contains a general information pamphlet entitled "Administering An Estate." That pamphlet specifically describes Mr. Webb's scenario (i.e., the surviving spouse and sole beneficiary) as one of two scenarios that renders the "probate process . . . much simpler. . . ." (This pamphlet is not in the Exhibits, but it is at "Exhibit A" to Ms. Bonenfant's deposition.). Notably, during his February 6, 1996, meeting with Mr. Webb and Ms. Michener, Mr. King, himself, described Ms. Webb's probate matter as involving a "simple will." See JS Exh. 11 at 084.

Mr. Webb begins effort to retrieve file: April 19, 2001

24. On April 19, 2001, Mr. Webb sent Mr. King a letter via certified mail (which Mr. King received on April 24, 2001), in which Mr. Webb requested a return of his file. See Stip. at ¶ 17; JS Exh. 1 at 016.
25. In that letter, Mr. Webb specifically requested the following: (a) the originals of his Will and that of his wife; (b) Mrs. Webb's Death Certificate; (c) all paperwork related to the proposed probate filing and transfer of GE Mutual Funds; and (d) copies of all documents filed by Mr. King or his firm on Mr. Webb's behalf. See Stip. at ¶ 17; JS Exh. 1 at 016.
26. On May 1, 2001, Mr. Webb filed an action to recover his retainer plus interest from Mr. King. Milford District Court docketed this case as 01-SC-143. See Stip. at ¶ 18; JS Exh. 1 at 014.
27. On May 17, 2001, Mr. Webb received a letter of apology from Mr. Quinn with an \$875.00 check (\$800 retainer, which was still in the trust account, plus \$75 in interest, calculated by Mr. Quinn). See Stip. at ¶ 19; JS Exh. 1 at 017. Mr. Quinn indicated in his letter both that Mr. Webb would hear from Mr. King "shortly," and Mr. King would forward him the requested documents. See JS Exh. 1 at 017.
28. On June 7, 2001, Milford District Court (Drescher, J.) entered a default judgment against Hubbard & Quinn in the amount of \$1250.00 (retainer plus interest). See Stip. at ¶ 20; JS Exh. 13.

29. Mr. King paid this judgment by cashier's check to Mr. Webb. See JS Exh. 12 at 054. Mr. Webb returned the \$875 check he had received from Mr. Quinn. See Stip. at ¶ 20.
30. On June 17, 2001, Mr. Webb wrote a letter to Mr. King again requesting return of all documents in his file. See Stip. at ¶ 21; JS Exh. 10 at 051.

Mr. King forwards portion of file: August 2, 2001

31. On or about August 2, 2001, (more than three months after Mr. Webb's original request for his file), Mr. King mailed Mr. Webb documents from his file. See Stip. at ¶ 22; JS Exh. 10 at 045.
32. That August 2 packet did not include Mr. Webb's or Ms. Webb's original Wills. The packet included only a copy of Ms. Webb's Will. See JS Exh. 2 at 021; Exh. 3 at 022, 023.
33. By letter dated September 4, 2002, Mr. Webb wrote to Hubbard & Quinn again requesting the Wills. That letter states:

In my filing of a complaint to the PCC in the matter of the Probate of Ann M. Webb, I have several times demanded return of original Wills of both myself, John Kenneth Webb and Ann Marie Webb. Some documents that I was to receive are in hand; however, I have not received either of the two Wills. I submitted the two original Wills to Donald King as we began our relationship, and there are two more originals that were retained in your office in May 1983. Your firm will have no further need for these Wills and they must be returned to me.

Am asking that both original Wills shall be transmitted to me at 6 Southfield Road, Amherst, NH 03031, by 16 September 2002.

See JS Exh. 3 at 023.

34. Mr. King never returned the original Wills to Mr. Webb. Mr. Webb did not receive even a copy of his own Will. See JS Exh. 3 at 022. In light of Mr. King's inaction, Mr. Webb decided to protect himself by executing a new Will.

35. In response to Mr. Webb's July 2, 2001, letter of complaint to the Professional Conduct Committee, Mr. King drafted a letter to the Committee dated August 2, 2001. See Stip. at ¶ 23; JS Exh. 9. In that letter, Mr. King wrote:

I filed the Will and Death Certificate in March and explained to the clerk that the Will left everything to the deceased's husband (John K. Webb). I asked what else need[ed] to be done. I was told that nothing more was required. Relying on that information, I did not file the Petition for Estate Administration, AU 101, or AU 101B (with attachments), which I had prepared at that time.

See Stip. at ¶ 23; JS Exh. 9 at 158 (emphasis in original).

36. In that same letter, Mr. King claimed that a clerk at the probate court again told him, "in either late 1998 or early 1999," that Mr. King did not need to file anything further.

Again, I explained matters to the clerk and again I was told that, for probate purposes, nothing more needed to be done. I accepted this without reviewing the statute, as I believe I should have done. I do not wish to shift the blame to the Probate Court staff, yet I do not think it was totally unreasonable of me to rely on information given to me by the Court, not once, but twice. If I had been told to file the Petition I could have done so within a day or

two as the document was prepared, sitting in the file, and just needed Mr. Webb's signature.

See Stip. at ¶ 24; JS Exh. 9 at 159.

37. The unfiled draft of the Petition to which Mr. King referred in his August 2 letter is located in JS Exh. 10 at 058-063.

Testimony of Kimberly Bonenfant: Deputy Register

38. Kimberly Bonenfant, the Deputy Register of Probate Court, had no personal knowledge of Ms. Webb's file. See JS Exh. 21 at 14. However, Ms. Bonenfant reviewed the file and concluded, to the best of her knowledge, that the following events transpired:

- a. On May 8, 1996, Ms. Webb's Will and Death Certificate were filed.
- b. The clerk initialed Ms. Webb's Will as follows: "UNC WILL" and "ADM TBF." See JS Exh. 21 at 18-19; Exh. 24 at 200.
- c. Those initials are official acronyms within the Probate Court. See JS Exh. 21 at 36. "UNC WILL" stands for "Uncompleted Will." See JS Exh. 21 at 19.
- d. An "Uncompleted Will" means that "When this will was filed, it was not complete to be processed." See JS Exh. 21 at 35.
- e. "ADM TBF" stands for "Administration To Be Filed." See JS Exh. 21 at 19.
- f. "Administration To Be Filed" means "that administration documents were to be filed regarding this will." See JS Exh. 21 at 36.
- g. That acronym would most likely have been placed on the Will in pencil at the time that the Will was filed.
- h. The clerk also placed her own initials under the "ADM TBF" acronym. Those initials were "JWM." See JS Exh. 21 at 18. Ms. Bonenfant knows the initials to be that of a former Probate Court employee named "Janice Morand." See JS Exh. 21 at 18, 20.

- i. The acronym "ADM TBF" indicates that, upon receipt of Ms. Webb's Will, the clerk would have understood that administration paperwork would be filed. See JS Exh. 21 at 36; 40.
 - j. It is most likely that the clerk learned this information from Mr. King, the individual who indisputably filed the Will on March 8, 1996. See JS Exh. 21 at 43.
 - k. After the March 8, 1996 filing of the Will and Death Certificate, nothing further was filed until 2001, when Mr. Webb filed his own documents. See JS Exh. 21 at 37. Because there was no action on the file for one year, the judge "accepted" the Will and the Probate Court closed the file on March 17, 1997. See JS Exh. 21 at 47.
39. The fact that Janice Morand interacted with Mr. King on March 8, 1996, is further corroborated by the fact that Ms. Morand also signed Mr. King's receipt for Ms. Webb's Will on that date. See JS Exh. 10 at 069.
40. According to Ms. Bonenfant, the markings in the file indicate that the clerk expected that further paperwork would be filed. See JS Exh. 21 at 36; 40.
41. There is a further reason that Mr. King's version of events is doubtful. According to Ms. Bonenfant, it would be a serious violation of internal Probate Court policy for a clerk to give legal advice, particularly to an attorney under circumstances such as Mr. King describes. See JS Exh. 21 at 45-46.
42. Mr. King's claims are even more doubtful in light of Mr. King's claim that he was told "nothing more needed to be filed" not once, but twice, by the Probate Court. Mr. King claims that a clerk told him "nothing further" needed to be filed at the time he filed in the Will in March 1996, and again, in "late 1998 or early 1999" on the telephone. See JS Exh. 9.

43. Had Mr. King spoken to a Probate Court employee in 1998 or 1999, after the court closed Ms. Webb's file, as Mr. King claims, the court employee would have told Mr. King that the case was closed, as no petition had ever been filed.

II. RULINGS OF LAW

Rule 1.1: Failing to Provide Competent Representation

Rule 1.3: Failing to Act with Diligence

44. By failing both to file the appropriate paperwork in Probate Court related to Mrs. Webb's estate and to effectuate the transfer of Mrs. Webb's GE Mutual Funds, as discussed above, Mr. King failed to act with reasonable promptness and diligence in representing Mr. Webb. See Stip at ¶ 25. Based upon all of the aforementioned facts, there exists clear and convincing evidence that Mr. King's failure in this regard constitutes a violation of N.H. R. Prof. Conduct 1.3(a). See Stip at ¶ 25.

Rule 1.4: Failure to Properly Communicate

45. By failing to explain to Mr. Webb the status of the transfer of his wife's GE Mutual Funds, Mr. King failed to keep Mr. Webb reasonably informed regarding the matter. Mr. King failed to properly update Mr. Webb on the status of his matter despite his repeated attempts from 1996-2001 to obtain an update from Mr. King.
46. Had Mr. King given Mr. Webb more specific information about the matter, (e.g., that he was unfamiliar with the probate process and was purportedly relying on clerks at the Probate Court for information), Mr. Webb could

have inquired with the Probate Court earlier on in Mr. King's representation. Had Mr. Webb inquired with the Probate Court earlier on in Mr. King's representation, he likely would have completed his deceased wife's probate matter and recovered the funds much sooner than he did.

47. Based upon all of the aforementioned facts, there exists clear and convincing evidence that Mr. King's failure in this regard constitutes a violation of N.H. R. Prof. Conduct 1.4(a)-(c).

**Rule 1.16(d): Late return of File
And Failure to Return Original Will**

48. Mr. King failed to return Mr. Webb's file promptly after Mr. Webb's April 19, 2001 request.
49. Mr. King sent Mr. Webb a copy of his file (which did not include Mr. Webb's Will) on or about August 2, 2001. Mr. King, therefore, waited more than three months to respond to Mr. Webb's original request for his file. Mr. King's delay of over three months in returning Mr. Webb's file is particularly troublesome in light of Mr. King's failure to handle Mr. Webb's substantive legal matter in a timely fashion.
50. Based upon all of the aforementioned facts, there exists clear and convincing evidence that Mr. King's failure to return Mr. Webb's file promptly constitutes a violation of N.H. R. Prof. Conduct 1.16(d). See Averill v. Cox, 145 N.H. 328, 339 (2000) ("[A] client's file belongs to the client, and upon request, an attorney must provide the client with the file.").

51. Based upon all of the aforementioned facts, there exist clear and convincing evidence that Mr. King's failure to return Mr. Webb's original Will to Mr. Webb constitutes a further violation of N.H. R. Prof. Conduct 1.16(d). To date, Mr. Webb still has not received his original Will from Mr. King.

**Rule 8.1(a): Dishonesty toward Disciplinary Agency
and Rule 8.4(c) Fraud, Dishonesty**

52. In Mr. King's August 2, 2001, letter to the Professional Conduct Committee, Mr. King claimed that he would have filed a Petition for Estate Administration on behalf of Mrs. Webb but for the fact that a clerk of Probate Court told Mr. King on two separate occasions that he needed to file "nothing" more than Mrs. Webb's Will and Death Certificate.

53. While Mr. King's account of his communication with the Probate Court staff is implausible, there is not clear and convincing evidence that Attorney King fabricated these conversations or knowingly deceived Mr. Webb about them. Accordingly, Violations of Rule 8.1(a) and 8.4(c) are not found.

Rule 8.4(a): Catch-all Rule

54. Because there exists clear and convincing evidence of violation of the aforementioned Rules, there is necessarily clear and convincing evidence of a violation of Rule 8.4(a). See Stip at ¶ 6.

III. REQUEST FOR COSTS

55. Mr. King is ordered to pay the expenses incurred by the Attorney Discipline Office in the investigation and prosecution of this matter. See N.H. Sup. Ct. R. 37(19).

IV. SANCTION

Having made the aforementioned findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter would be a one year suspension. 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.") The sanction is consistent with the recommendation of the Hearing Panel. The Committee finds the terms of the stipulation as follows:

1. A one-year suspension is consistent with New Hampshire case law and the goals of attorney discipline.

2. Under New Hampshire case law, the goals of attorney discipline are four-fold: (1) protect the public; (2) maintain the public confidence in the bar; (3) preserve the integrity of the legal profession; and (4) prevent similar conduct in the future. *See, e.g., Feld's Case*, 149 N.H. 19, 28 (2002). "Lawyer discipline is not intended to be punishment." *Id.*

3. A one-year suspension addresses the purposes of attorney discipline. First, the public is protected by the removal of Mr. King from the practice of law for a significant period of time. Additionally, the public will be notified and have an opportunity to respond at such time in the future that Mr. King seeks reinstatement to the Bar. N.H. Sup. Ct. R. 37(14)(b).

4. Second, a one-year suspension will promote both public confidence in the Bar and preserve the integrity of the legal profession. As the Hearing Panel found, Mr. King's neglect of his elderly client who had recently lost his wife was "persistent and repetitive." This conduct deserves a significant sanction.

5. Finally, a one-year suspension will help to prevent similar misconduct in the future by sending a strong message to attorneys, in addition to Mr. King, that a harsh sanction is meted out for misconduct of this magnitude.

6. In sum, a one-year suspension is consistent with the purposes of attorney discipline as well as other New Hampshire cases.


Margaret H. Nelson, Reporter