New Hampshire Supreme Court

Professional Conduct Committee

a committee of the attorney discipline system

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O'Meara, Timothy A. advs. James and Anita Conant # 07-004

ORDER ON MOTION TO RECONSIDER RECOMMENDATION FOR THREE YEAR SUSPENSION

On August 20, 2010, the Professional Conduct Committee issued a decision recommending a two year suspension in this matter. A Motion for Reconsideration was filed by Disciplinary Counsel Jennifer B. Sargent. Mr. O'Meara objected to the motion and argued that the two year suspension achieves the goals of attorney discipline.

On November 16, 2010, the Professional Conduct Committee deliberated the motion filed by Disciplinary Counsel and the Objection filed by Respondent's counsel Michael R. Callahan, Esquire. Members Benette Pizzimenti, Vice Chair and Chair of this matter, Toni M. Gray, Vice Chair, Thomas P. Connair, Gerald A. Daley, Richard H. Darling, Julie A. Introcaso, and James R. Martin were present. Members Susan R. Chollet, Alan J. Cronheim, and Margaret H. Nelson were recused. David N. Cole was absent.

Upon a motion made and duly seconded, and following further discussion the Committee voted to grant the Motion to Reconsider. After reconsideration and review of the extensive record, including the transcripts of the oral argument and hearings, exhibits and memoranda, the Committee voted to recommend a three year suspension rather than a two year suspension.

Although Disciplinary Counsel made a strong argument for disbarment, the Committee concluded that imposing a three year suspension better serves the goals of attorney discipline. The Committee reaffirms the facts as found, and violations stated in its decision of August 24, 2010.

In granting reconsideration the Committee reviewed the arguments made by Disciplinary Counsel and concludes that the generally appropriate baseline sanction pursuant to the *Standards* under Section 5.1 is disbarment. The Committee agrees with Disciplinary Counsel that ABA Standard 5.11(b) is the appropriate standard for the violation of New Hampshire Supreme Court Rule Prof. Conduct 8.4(c) in connection with Mr. O'Meara's false testimony before the arbitration panel about his fee of 2 million dollars. *Notice of Charges* ¶ 116. We look to the *Standards* for guidance as they have not been formally adopted by the Court.

The New Hampshire Supreme Court has the ultimate authority to determine whether, on the facts found, a violation of the rule has occurred and if so, to impose the proper sanction. *Conner's Case*, 158 N.H. 299 (2009). Each case must be judged on its own facts and circumstances taking into account the severity of the misconduct. *Coffey's Case*, 152 N.H. 503, 513 (2005). If there are multiple charges, the sanction is generally consistent with the most serious misconduct among a number of violations. *Wyatt's Case*, 159 N.H. 285, 306 (2009).

The Notice of Charges included three deceit charges in Paragraphs 116–118. The Hearing Panel found misconduct on Paragraph 116, but there was no finding of misconduct as to the other two allegations. The allegations of deceit arise from Mr. O'Meara's conduct during arbitration of a fee dispute after the Conant's personal injury case had been settled. As Disciplinary Counsel stated to the Hearing Panel in her opening statement on October 20, 2009,

"All of these deceit charges, by the way, stem from Mr. O'Meara's testimony at the arbitration of the fee, okay." Transcript, 10/20/09, at 29: 10–12.

When they retained Mr. O'Meara, the Conants' signed a standard fee agreement letter with a provision for 33.3% contingent fee based on the gross award. From the mathematical calculations alone, based on the settlement of $11,500,000, Mr. O'Meara's fee could have been $3,829,500. Although a fee of $2,000,000 was discussed by the parties, this number simply did not satisfy the Conants' financial plan based on their estimate of family monthly expenses. From Mr. Conant's perspective, he made it clear to Mr. O'Meara that the settlement amount had to be at least $14,500,000 if the attorney fee was $2,000,000 *See* Exhibit 36, Doc. Nos. 1368 and 1369. This was explained by Disciplinary Counsel as follows:

> "Now, Jim makes it clear to Tim the way in which 2 million would be okay, and here's how it goes. In his mind, in Jim's mind, 12.5 million is the number, the minimum number the family can live with for an annuity, structured-type settlement. So 12.5 million is his number. He says to Tim, listen, get us 12.5 million and you can have 2 million. So you need to get us a total of 14.5. The settlement needs to be 14.5 so we can walk away with the minimum we need for Anita.

Tr. 10/20/09, at 24: 14-22.

As reflected in Judge Strawbridge's order, the Conants were unlikely to recover in excess of $11,500,000, which would have constituted $500,000 over and above the policy limits of the insurance coverage. Bankruptcy of the defendant company was also a possibility that could not be ignored. Although Disciplinary Counsel suggests bankruptcy might not have been an impediment to collection above the insurance policy's limits, the Committee can only speculate what course the case would have taken if the mediation failed and the parties proceeded to trial. In all likelihood, the outcome would have been delayed for months or years with the trial and the

prospect of appeals. The agreement that was reached included a provision for arbitration of the fee dispute before a panel of experienced litigators. Mr. O'Meara received an initial payment of $750,000 (the undisputed amount) with the disputed balance of $1,250,000 held in escrow pending the arbitration.

Although the Rule 8.4(c) violation arises in the context of a fee dispute, there is no charge that Mr. O'Meara's fee was excessive. In other words, the Notice of Charges does not include a violation of Rule 1.5 (Fees). Under this Rule, a lawyer is prohibited from entering into an agreement for, charge, or collect an illegal or "unreasonable" fee.

New Hampshire adopted language in Rule 1.5(a) that is substantially the same as the Proposed 2004 ABA Model Code of Professional Responsibility. That change replaced the existing standard of prohibiting a "clearly excessive" fee with one that is "unreasonable." Contingency fees, especially when they cannot be justified by well kept time records, may seem unreasonable to a client. Mr. O'Meara recognized that Anita Conant's case offered the opportunity for a substantial profit, and that the Conants had envisioned a life plan designed to take care of the family's needs and monthly expenses[1]. "[L]awyers, like most human beings, have a tendency to overlook ethical considerations when they get in the way of profits." (Attributed to Abraham Lincoln).

In connection with fee disputes, the 2004 ABA Model Code Comments to Rule 1.5(a) state:

> [9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should

[1] As restated in The Georgetown Journal of Legal Ethics, Summer 2003, "Lawyers, ethics and fees: Getting paid under Model Rules"

conscientiously consider submitting to it.

Mr. O'Meara agreed to participate in arbitration in conjunction with a settlement agreement and release which defined the scope of arbitration. The disputed amount of $1,250,000 was deposited in escrow, with any amount later released to Mr. O'Meara to be used for the purchase of a structured settlement annuity to fulfill the periodic payment obligations between Mr. O'Meara and the Conants. The case would be submitted to a panel of three arbitrators and conducted pursuant to RSA 542. It was understood that the Conants could assert any and all defenses but they would make no claim in the arbitration of any failure of Mr. O'Meara to achieve a reasonable result. Exhibit 52 and 53.

The Committee has considered aggravating and mitigating factors. As stated in the initial recommendation for a two year suspension, the only possible mitigating factor was delay in the proceedings. That factor was given little weight. Mr. O'Meara's prior disciplinary history is an aggravating factor, as a prior finding of misconduct bear a similarity to the instant case. In *O'Meara's Case*, 150 N.H. 157 (2003), the Court imposed a Public Censure. The Court looked at the circumstances surrounding Mr. O'Meara's misconduct and found "important differences between this case and those in which suspension was ordered for violations of the same rules..." *Id.* at 160.

The Committee recognizes a distinction between this case and others in which disbarment was ordered. In *Morse's Case*, (decided 7/20/2010) disbarment was ordered because Mr. Morse caused serious injury to the client and lied to his client and to the tribunal. Morse claimed that he had filed certain tax returns when in fact no returns had been filed. Other attorneys have been

disbarred for lying to a marital master over a period of several months in a pending case; falsely stating to a client that he had filed a bankruptcy petition when he had not; and otherwise lying during the course of representation. *See, Bosse's Case*, 155 N.H. 128 (2007). The Court recently ordered disbarment of Ms. Notaris for misconduct involving altering pleadings and computer records. *See In the Matter of Mary Notaris* LD-2010-0008 (decided November 10, 2010).

Here, the most serious charge arises from conduct that occurred after representation of the client was terminated in the context of a fee dispute. The parameters of the disputed amount were defined in the settlement agreement. The arbitration occurred over a period of five days before an experienced panel selected with input from the parties. Having defined the dispute, it was fully expected that each party would vigorously advocate its position with so many dollars at stake. Nevertheless, Mr. O'Meara's profit motive does not justify false testimony. The arbitration panel was in the best position to judge the credibility of the testimony and in the end awarded Mr. O'Meara a total fee of $1,587,000 ($750,000 with $837,000 of the disputed fee). It is unclear how this award was calculated as the full decision of the panel was not provided to the Committee.

In its earlier report the Committee noted that "disbarment" is not permanent. In the recent order disbarring Ms. Notaris, the Court's order provides that she may seek readmission to the bar not earlier than three years from the date of the order. She is required to pass the New Hampshire Bar Examination and the Multistate Professional Responsibility Examination and satisfy other requirements of Rule 37(14). In a recent case involving Mr. Morse, the Court did not determine when he could apply for readmission.

Historically, the Committee has recommended suspensions of a maximum of two years.

ABA Standard ¶ 2.3 provides that suspension should be for a period of time equal to or greater than six months but "in no event should the time period prior to application for reinstatement be more than three years." A criteria for reinstatement is described as "demonstrating rehabilitation and fitness to practice law." Supreme Court Rule 37(14) addresses the requirements for readmission of disbarred attorneys and reinstatement in the case of a suspended attorney. In both cases, the respondent has the burden of proving by clear and convincing evidence that he or she has the moral qualifications to practice law. The applicant must also show that the resumption of the practice of law will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive to the public interest. *See also* requirements in Rule 37A(II)(d)(2). An applicant for readmission must also take the Bar Exam and receive a favorable report from the Committee on Character and Fitness.

The Committee hereby directs Disciplinary Counsel to file a Petition with the New Hampshire Supreme Court for a three year suspension. The other provisions of the earlier order remain unchanged. In the event Mr. O'Meara intends to apply for reinstatement he must be prepared to demonstrate by clear and convincing evidence his rehabilitation and fitness to practice law. The Rules do not specify what evidence supports a conclusion that the applicant has the moral qualifications to practice law. In this case, Mr. O'Meara's actions, rather than words, will reflect on his qualifications.

January 3, 2011

Benette Pizzimenti
Vice Chair

Distribution:

- Jennifer B. Sargent, Disciplinary Counsel
- Michael R. Callahan, Esquire
- Marla Matthews, Esquire
- James P. Bassett, Esquire
- Jennifer Eber, Esquire
- Mr. and Mrs. Conant
- File

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RECOMMENDATION FOR A TWO YEAR SUSPENSION

On May 18, 2010, the Professional Conduct Committee ("Committee") heard oral argument in the above-captioned matter pursuant to New Hampshire Supreme Court Rule 37A(III)(b)(2). Members present included: Benette Pizzimenti, Vice Chair and Acting Chair in the matter, Toni M. Gray, Vice Chair, David N. Cole, Thomas P. Connair, Gerald A. Daley, Richard H. Darling, Julie A. Introcaso, James R. Martin and Jennifer L. Parent. Margaret H. Nelson, Chair, and Alan J. Cronheim were recused and did not participate. Susan R. Chollet was absent. Mr. Cole disclosed that he was involved in an action against Mr. O'Meara four or five years ago. The parties had no objection to Mr. Cole's participation.

Landya B. McCafferty, Disciplinary Counsel, appeared for the Attorney Discipline Office. Michael R. Callahan, Esquire, appeared for the Respondent, Timothy A. O'Meara, Esquire.

Respondent's Counsel, Michael R. Callahan, Esquire, and his associate, Marla B. Matthews, Esquire, filed a Motion for Mistrial. The Respondent claimed that the Hearing Panel's decision was tainted as the Reporter sent an *ex parte* e-mail to Disciplinary Counsel while the

case was pending and immediately prior to the issuance of the report on sanction. The e-mail congratulated Disciplinary Counsel on her appointment to the Federal Court and inquired about her job. The Committee denied the Motion for the reasons stated in Disciplinary Counsel's Objection as Mr. O'Meara failed to establish a legal or factual basis for a finding of bias by the Hearing Panel in making recommendations on sanction. The Committee notes that the Hearing Panel only has the power to make recommendations as to sanction and that the Supreme Court has the ultimate authority to determine an appropriate sanction. *Conner's Case*, 158 N.H. 299, 303 (2009).

James P. Bassett, Esquire, and Jennifer A. Eber, Esquire, co-counsel for James E. Conant ("Jim") and Anita Conant, filed a Motion to Intervene, which the Committee denied. However, the Committee agreed to accept the memorandum regarding sanction of "forfeiture of fees," appended to the Motion as Attachment A. (Record at Tab 35.) The Record also includes at Tab 29 a letter from Mr. Bassett to the Hearing Panel Chair addressing the issue of sanction. The Conants request that the sanction be disbarment, and that Mr. O'Meara be required to forfeit his legal fees that he received in connection with the Conants' case. Although Disciplinary Counsel advocated for disbarment, which she noted is not "permanent," she also decided not to pursue a request for disgorgement of legal fees. Her position is based on an understanding that the parties participated in arbitration of the fee dispute and that the Rules do not provide for the relief requested by the Conants.

Following oral argument, the Committee deliberated this matter and considered the entire Record, including the Notice of Charges, Answer, Hearing Panel Reports, transcripts of the hearings, exhibits and memoranda.

This case stems from Mr. O'Meara's representation of Anita and James Conant in a personal injury case from May 25, 2005 through February 2006. Anita was in a car accident in Pennsylvania. She was stopped at a red light when she was rear-ended by a paving truck. She suffered catastrophic injuries and is completely paralyzed. She was 47 years old at the time and faces staggering medical bills for the foreseeable future. Mr. O'Meara was retained to represent the Conants on a contingency fee basis at 33.3% of the gross amount recovered. The case quickly unfolded as the insurance company for the defendants acknowledged liability and Mr. O'Meara was advised that the paving company's insurance coverage was $11,000,000.00. By the time the case settled for $11,500,000.00, the relationship between Mr. O'Meara and his clients had deteriorated and proceeds were held in escrow pending the outcome of arbitration to resolve a fee dispute.

The Notice of Charges alleges rules violations arising from N.H. Rules of Professional Conduct Rule 1.2(a): Scope of Representation, by offering to settle the case without his client's authority; Rule 1.7(b): Conflict of Interest, by placing his own financial interest in maximizing his fee above the interest of his clients; Rule 8.4(c): Deceit and Dishonesty, regarding false testimony at an arbitration proceeding of the underlying fee dispute, and Rule 8.4 (a): General Rule.

I. FINDINGS OF FACT

The Hearing Panel held five days of testimony and issued a Preliminary Summary Report on December 2, 2009. After a hearing on sanction, a final Hearing Panel Report was issued on February 8, 2010. Although there was no stipulation as to facts, the Hearing Panel made findings

based on "admitted facts" taken from Mr. O'Meara's Answer to the Notice of Charges, and ruled on Disciplinary Counsel's Proposed Findings of Fact and Rulings of Law. (*See* Hearing Panel Report, Page 22, Paragraph E.) Many of the Proposed Findings duplicate similarly numbered paragraphs in the Notice of Charges. The "admitted facts" are the same as the granted proposed facts.

The Committee finds that there is clear and convincing evidence to establish the following findings of fact:

1. Mr. O'Meara is an attorney licensed to practice law in New Hampshire. Mr. O'Meara was admitted to practice on May 29, 1993. At all times material to this proceeding, Mr. O'Meara operated his law office as O'Meara Law, P.L.L.C., 45 Summer Street, Keene, New Hampshire 03431. Answer at ¶ 1.

2. This case stems from the legal representation in a personal injury case that Mr. O'Meara provided to Anita M. and James E. Conant for a time period lasting less than one year, from May 25, 2005, through the end of February 2006. Answer at ¶ 2.

May 19, 2005: The Accident

3. The personal injury case arose as a result of a car accident involving Anita Conant that occurred in Willistown, Pennsylvania on May 19, 2005. On that date, Anita Conant was sitting in her car at a red light and was rear-ended by a paving truck, traveling at approximately 55 mph at the time. Answer at ¶ 3.

4. The paving truck was owned by Lyons & Hohl Paving, Inc., and was driven by its employee, Paul Thimm. The force of the impact was so severe that it propelled Anita

Conant's car 130 feet forward; her car landed upside-down in a ditch along the side of the highway. Answer at ¶ 4.

5. As a result of the accident, Anita Conant suffered catastrophic injuries and is completely paralyzed. Answer at ¶ 5.

6. Immediately after the accident, Anita Conant was intubated for respiratory failure and flown by helicopter to the hospital at the University of Pennsylvania. She remained at that hospital for 23 days in critical condition and was in and out of a coma. Answer at ¶ 6.

7. At the time of the accident, Anita Conant was 47 years old. She and Jim Conant lived in Hampton, New Hampshire, with their three children, Todd (age 25), Sean (age 23), and Ashley (age 18). Jim Conant was an electrician and owned his own electrical business. Anita Conant was the Postmaster of the New Castle, New Hampshire, Post Office. Answer at ¶ 7.

May 25, 2005: Jim Conant Retains Mr. O'Meara

8. On May 24, 2005, five days after Anita Conant's accident, Jim Conant flew back to New Hampshire with his mother, Margaret Conant. Before their return flight to Pennsylvania the next day, on May 25, 2005, Jim Conant and his mother met with Mr. O'Meara about legal representation regarding the accident. Answer at ¶ 8; Day 4, p. 29 (Mr. O'Meara's testimony about his meeting with Jim Conant on May 25, 2005).

9. Jim Conant learned about Mr. O'Meara through his brother, Craig Conant, who was friendly with Mr. O'Meara and his wife, Dorrie O'Meara. Answer at ¶ 9.

10. The meeting with Mr. O'Meara occurred at a McDonald's restaurant near the Manchester Airport.. Jim Conant and Mr. O'Meara sat at a table and discussed matters. Answer at ¶ 10. Jim Conant's mother sat nearby but was not part of the conversation. The meeting lasted approximately one hour. Day 1, pp. 61-65.

11. As a result of the meeting, Jim Conant decided to retain Mr. O'Meara. He and Mr. O'Meara signed the one-page contingency fee agreement ("Fee Agreement"), *see* Exh. 2, that Mr. O'Meara brought with him to the meeting. Answer at ¶ 11.

12. Mr. O'Meara did not discuss with Jim Conant the possibility of hiring local Pennsylvania counsel to assist him with the case. Answer at ¶ 12.

13. Mr. O'Meara did not inform Jim Conant that he was not licensed in Pennsylvania, and that without the assistance of local counsel, no lawsuit could be filed in Pennsylvania until such time as he became licensed there. Answer at ¶ 13.

14. The Fee Agreement, Exh. 2, provided that Mr. O'Meara would be paid 33.33% of the "gross amount recovered" in the case, and that the Conants would be responsible for all expenses in the case. Answer at ¶ 14.

15. Paragraph C of the Fee Agreement, entitled "Legal Fees and Expenses," states:

> 1. O'Meara Law, P.L.L.C. agrees to represent the client on a contingency fee basis. This means that should any member or employee of O'Meara Law P.L.L.C. recover, obtain, or secure agreement for any amount of money on behalf of the clients in this matter, the legal fees will be satisfied by 33.33% of the gross amount recovered.
>
> 2. In addition to the attorneys fees set forth in paragraph C(1), the Clients

> shall also be responsible for the reimbursement of any expenses advanced or incurred by O'Meara Law, P.L.L.C. related to the representation of the clients. The clients are responsible for any such expenses regardless of a recovery.

Answer at ¶ 15.

16. Paragraph D of the Fee Agreement, entitled "Termination of Representation," states:

> The client may terminate representation at any time. O'MEARA LAW, P.L.L.C. may terminate representation for any just reason as permitted or required under the Rules of Professional Conduct. Notification either way must be in writing. If the Client terminates representation, O'MEARA LAW, P.L.L.C. shall have a lien against Client's settlement, award or verdict amount for fees and costs (expenses) incurred during the course of the representation. The lien will be calculated at the rate of $275.00 per hour for services rendered by any staff member, plus expenses incurred.

Answer at ¶ 16.

17. Approximately ten days after his initial meeting with Jim Conant, on or about June 3, 2005, Mr. O'Meara learned that Lyons & Hohl, Inc., had insurance coverage totaling $11 million. Answer at ¶ 17.

18. The insurance policy was issued by The Cincinnati Insurance Companies. Robert S. Davis, Esq., of Philadelphia, Pennsylvania, was retained by Cincinnati Insurance Companies to represent Lyons & Hohl Paving, Inc., and Paul Thimm. Answer at ¶ 18.

19. While in Pennsylvania, Anita Conant underwent several surgeries to repair and stabilize her, including a cervical spinal fusion to insert steel rods into her spine, a tracheotomy to insert a permanent tracheal ventilator upon which Anita Conant is dependent to breathe, and the installation of a tube for feeding. *See* Answer at ¶ 19 (generally admitted); Exh. 32, p. 1111 (Mr. O'Meara's description of Anita Conant's surgical procedures).

20. On June 9, 2005, Anita Conant was transferred to Massachusetts General Hospital ("Mass General") so that she could be closer to home. After 13 days at Mass General, the family decided to attempt an aggressive spinal cord rehabilitation program at Shepherd Center in Atlanta, where Anita Conant stayed from June 22 through August 10, 2005. During this time, the entire family attended classes and received direct training on the procedures necessary for her care. Answer at ¶ 20.

21. Following her stay at the Shepherd Center in Atlanta, Anita Conant was transferred to Exeter Skilled Nursing Care, a nursing home in Exeter, New Hampshire. She remained in Exeter for a short time, while her family completed renovations on their home in Hampton so that Anita Conant would be able to live at home. Answer at ¶ 21.

22. On August 31, 2005, after the family home was renovated for Anita Conant, she returned home to live and be cared for by nurses and her family. Answer at ¶ 22.

November 3, 2005: Mr. O'Meara Files Suit in Philadelphia

23. On November 3, 2005, the same date that Mr. O'Meara was sworn into the Pennsylvania Bar, he filed the personal injury lawsuit on behalf of Anita and Jim Conant in federal court in Philadelphia, Pennsylvania. Answer at ¶ 23.

24. On December 1, 2005, Mr. Davis, along with a Claims Manager from Cincinnati Insurance, visited Anita Conant at her home in Hampton. On that date, Mr. Davis informed Mr. O'Meara that Cincinnati would not be contesting liability. Answer at ¶ 24.

25. In a letter to Mr. Davis dated December 8, 2005, Mr. O'Meara wrote:

> . . . As I have indicated on numerous occasions previously, this is a policy limits case. If said limits are not paid, the Conant family has instructed me to proceed to trial. . . .

Answer at ¶ 25.

26. As of December 8, 2005, neither Anita Conant nor Jim Conant had authorized Mr. O'Meara to offer settlement for the policy limits. Answer at ¶ 26.

27. Mr. O'Meara made this December 8 demand, knowing that he did not have authority to settle the case for the policy limits at that time. Answer at ¶ 27.

28. Mr. O'Meara retained a certified life care planner, Dr. David B. Stein, who prepared a Life Care Plan for Anita Conant dated December 26, 2005. This Plan listed a total "lifetime cost" needed to sustain Anita Conant at $15,342,083.00. Answer at ¶ 28.

January 13, 2006: Settlement Discussions

29. On January 13, 2006, Mr. O'Meara had an extended discussion with Mr. Davis about potential settlement of the case. Mr. O'Meara discussed the possibility of a structured settlement, and expressed an interest in structuring his fee. Mr. O'Meara told Mr. Davis that in exchange for the policy limits, less advance payments, Lyons & Hohl along with its employee, would be fully released. Answer at ¶ 29 (admitting that this paragraph reflects "portions of the conversation of January 13, 2006"); Exh. 27, p. 1049 (Mr. Davis's February 3, 2006, letter, in which he summarizes his January 13, 2006, conversation with Mr. O'Meara); Day 3, pp. 23-24 (Mr. Davis's testimony confirming same).

30. On January 13, Mr. O'Meara also had a discussion with Jim Conant over the telephone. Jim Conant made clear to Mr. O'Meara during that conversation that Mr. O'Meara was

not authorized to settle the case for the policy limits, even if the policy limits were offered. Answer at ¶ 31.

31. Following his telephone conversation with Jim Conant on January 13, and prior to his conversation with Mr. Davis on January 24, Mr. O'Meara did not communicate with Mr. Davis that his December 8 demand to settle for the policy limits was revoked, or that any other subsequent offers to settle for the policy limits were withdrawn. Day 3, p. 49 (Mr. Davis's testimony that, prior to January 24, 2006, Mr. O'Meara had never indicated he lacked authority to make December 8 demand); Day 4, pp. 133-36 (Mr. O'Meara's testimony about the time between January 13 – 24, and his not having communicated to Mr. Davis that he lacked authority to make the December 8 demand); Exh. 32, pp. 114-16 (Mr. O'Meara's pleading dated February 17, 2006, in which he argues that, after January 13 conversation with his clients, he did not reveal his clients' withdrawal of authority to settle for the policy limits because it was an attorney-client "confidential" communication).

January 24, 2006: Mr. Davis Accepts Offer to Settle for Policy Limits

32. On January 24, 2006, Mr. Davis and Mr. O'Meara had a telephone conversation during which Mr. Davis informed Mr. O'Meara that he was able to persuade his client to accept Mr. O'Meara's offer to settle for the policy limits, and that he was calling to formally accept Mr. O'Meara's terms. During this telephone conversation, but only after Mr. Davis communicated his clients' acceptance of Mr. O'Meara's offer to settle for the policy limits, Mr. O'Meara stated that the offer was no longer on the table. Mr. Davis stated that the offer had been made and was accepted, and the contract was enforceable.

Day 3, pp. 25-29 (Mr. Davis's testimony about the January 24, 2006, telephone conversation); Exh. 15 (Mr. Davis's January 24, 2006, letter to Mr. O'Meara).

33. To confirm the conversation, Mr. Davis drafted a letter to Mr. O'Meara dated January 24, 2006, stating:

> I write to confirm my telephone acceptance of this date, on behalf of the defendants and their insurer, of the plaintiffs' policy limits offer to settle all aspects of this case for the policy limits of $11,000,000.
>
> Subsequent to the above referenced acceptance of the plaintiffs' settlement offer you stated that the plaintiffs now withdraw the offer.

Day 3, pp. 25-29 (Mr. Davis's testimony about the January 24, 2006, telephone conversation); Exh. 15 (Mr. Davis's January 24, 2006, letter to Mr. O'Meara).

34. In response, Mr. O'Meara drafted a letter to Mr. Davis on January 24, which Mr. O'Meara dated January 20, 2006. Exh. 16. In that letter, Mr. O'Meara wrote:

> As we discussed on the phone this morning, this correspondence should serve to inform you that my clients have withdrawn their settlement demand for the policy limits of $11,000,000. Their concerns are that said amount simply does not adequately compensate Anita for all of her pain and suffering, her economic losses, her past medical bills and her future medical needs. Further, it does not sufficiently provide for the current medical costs that are far in excess of those originally anticipated.
>
> Please let me know if you can see any reasonable alternatives to trial in this situation. Thank you.

Answer at ¶ 35.

35. Messrs. O'Meara and Davis had not had any contact on January 20. Answer at ¶ 36.

36. On January 24, 2006, Mr. Davis wrote the following in a letter, to Mr. O'Meara:

> I acknowledge receipt of your letter which you have dated January 20, 2006 in which you refer to our telephone conversation earlier today during which you informed me that your clients have withdrawn their settlement

> demand for the policy limits of $11,000,000.00. I trust that the date used on the letter was simply the result of inadvertence.

Exh. 17; Answer at ¶ 37.

37. Following his receipt of copies of the January 24, 2006, correspondence between Mr. O'Meara and Mr. Davis, Jim Conant had several telephone conversations with Mr. O'Meara. Answer at ¶ 38.

38. In conversations with Mr. O'Meara following receipt of the January 24 correspondence, Jim Conant expressed his dismay that Mr. O'Meara had made an offer to settle for the policy limits without any authority to do so. Jim Conant said that he and Anita Conant were concerned by the statement in his January 24 letter (dated January 20) that "my clients have withdrawn their settlement demand for the policy limits . . . ." Jim Conant told Mr. O'Meara that he did not understand how he and Anita could "have withdrawn" a settlement demand that they had never made. *See* Answer at ¶ 39 ("generally admits the subject matter of the conversations"); Exh. 35, p. 1387 (Jim Conant's written statement describing these conversations); Day 1, pp. 112-19 (Jim Conant's testimony regarding same).

39. In response to Jim Conant's concern, Mr. O'Meara assured Jim Conant that it was simply a matter of Mr. Davis having misconstrued conversations about settlement as formal offers and demands to settle. Answer at ¶ 40 (admitting that "he told Mr. Conant that Mr. Davis was twisting the words to make it look like they had offered to settle the case for $11 million and they had not"); Exh. 35, p. 1387 (Jim Conant's written statement detailing Mr. O'Meara's responses to the Conants' concerns).

40. On or about January 25, 2006, Mr. O'Meara met with the Conant family and two financial planners, Richard Neville and Ronald Sullivan, to assist the family with plans for a structured settlement. Answer at ¶ 41.

41. At that meeting, a structured settlement plan dated January 25, 2006, Exh. 20, was presented to the family. Answer at ¶ 42.

42. On or about that same date, Jim Conant had further conversations with Mr. O'Meara about the family's concern that the policy limits were not sufficient to support Anita Conant's needs for her future. Answer at ¶ 43. Jim Conant also communicated serious concerns the family had about Mr. O'Meara's representation of them, specifically their concerns regarding his offer to settle for the policy limits. Day 1, pp. 112-19 (Jim Conant's testimony regarding these conversations); Exh. 35, p. 1389 (Mr. O'Meara's letters dated January 26, 2006, reflecting "candid" discussion regarding fees and issue of his termination).

43. During this January 26, 2006 conversation, Jim Conant suggested to Mr. O'Meara that, in light of Mr. O'Meara's error in offering to settle for the policy limits, Mr. O'Meara should consider reducing his fee. Day 1, p. 115 (Jim Conant's testimony: "we just thought that he should be held responsible if this was the way it was going to be"); Exh. 35, p. 1388-89 (Jim Conant's written statement: "It was agreed that Jim would approach O'Meara and start a dialogue with him about reducing his fee. The family felt that if in the end the defendants motion to uphold the settlement agreement for the policy limits was granted, then O'Meara should bear major responsibility for allowing this to happen. Jim explained to O'Meara how the family viewed the situation and asked him to consider

reducing his fee, he said he would consider that. He came back with an offer to reduce his fee by $166,000.00. Although we appreciated any gesture on his part, this was *not close to what the family considered to be fair for this possible blunder on his part*.") (emphasis added); Exh. 22 (Mr. O'Meara's letter dated January 26, 2006, reflecting "candid" discussions regarding his legal fee as well as what would happen "if [the Conants] decided to terminate my services today").

44. Dr. Stein drafted a second Life Care Plan for Anita Conant dated January 26, 2006. Exh. 21, p. 1008. This Plan listed a total "lifetime cost" needed to sustain Anita Conant at $23,011,845.72. Answer at ¶ 45.

<u>January 31, 2006: Davis's Motion to Enforce Settlement Agreement</u>

45. On or about January 31, 2006, Mr. Davis filed "Defendants' Motion to Enforce Settlement Agreement." In that Motion, Mr. Davis wrote:

> Settlement negotiations have involved attorneys O'Meara and Davis. During the course of those negotiations counsel for the plaintiff, on several occasions, communicated an offer to settle all aspects of the case, resulting in a full release of both defendants, in exchange for payment by The Cincinnati Insurance Company of the $11,000,000.00 policy limit (reduced only by a payment made in the amount of $16,409.00 for property damage to the automobile being operated by Anita Conant at the time of the accident) which includes partial payments to the plaintiffs in December 2005.
>
> On January 24, 2006, during a telephone conversation between Attorneys O'Meara and Davis, counsel for the defendants unqualifiedly accepted the plaintiff's offer and tendered the balance of the $11,000,000.00 policy limits.

Answer at ¶ 47.

46. Mr. Davis argued in his Motion that Mr. O'Meara's retraction of the offer after it had been formally accepted was ineffective as a matter of contract law. *See* Exh. 25.

47. On or about February 7, 2006, Mr. O'Meara filed an Objection to Defendants' Motion to Enforce Settlement Agreement. Exh. 29. In the Objection, Mr. O'Meara characterized the defendants as having offered to settle for the policy limits, which offer was rejected by the plaintiffs. Mr. O'Meara also wrote: "Plaintiffs had not authorized their counsel to accept, nor has he accepted, the Defendants' offer in this case for the policy limits." Answer at ¶ 49.

48. On or about that same date, Mr. O'Meara filed a memorandum in support of his Objection. Exh. 29, pp. 39-62. In his memorandum, Mr. O'Meara conceded: "Plaintiffs [sic] December 8th letter is clearly a demand for the payment of the policy limits." Exh. 29, p. 41.

49. Mr. O'Meara attached several exhibits to the memorandum, including Jim Conant's affidavit dated February 6, 2006. Exh. 29, pp. 59-60. In the final paragraph of that affidavit, Jim Conant stated: "At no time had we given our attorney express authority to settle this case for $11,000,000. All settlement authority was revoked after our conversation of January 13, 2006 as we had made it very clear that this offer, even if it was made, was simply not enough." Answer at ¶ 51.

50. In late January and early February 2006, and as a result of Mr. Davis's January 24 letter and his January 31 Motion to Enforce, Jim and Anita Conant and the Conant family began to focus on their financial situation, assuming that the settlement would be the $11 million policy limits. *See, e.g.*, Day 1, pp. 98-104; 129-32 (Jim Conant's testimony

regarding this issue); Exh. 35, pp. 1388-99 (Jim Conant's written statement regarding the same.)

51. As a result of the life plans for Anita Conant prepared by financial planners hired by Mr. O'Meara and the family, Jim Conant and his family reached the conclusion that Anita Conant needed $12.5 million to place into an annuity to support her for her lifetime. *See, e.g.*, Day 1, p. 154 (Jim Conant's testimony regarding $12.5 million); Exh. 35, p. 1389 (Jim Conant's written statement: "the family went over their projected budget with Mr. O'Meara and he could clearly see that the family would need to have a base figure of $12,500,000.00 to meet their projected needs"); Day 3, p. 76, 100 (Craig Conant's testimony regarding $12.5 million).

<u>February 25, 2006: Meeting at Conant's Home</u>

52. On Saturday, February 25, 2006, Mr. O'Meara came to the Conant's home to meet with them in order to prepare for a mediation that was scheduled to occur in federal court in Philadelphia on that following Monday, February 27, 2006. Answer at ¶55.

53. Mr. O'Meara and Craig Conant rode together in the drive from Keene to Hampton. Answer at ¶ 59.

54. Prior to the February 25 meeting, Jim Conant spoke with Alan Ganz, Esq., an attorney in Seabrook, for whom Jim Conant's company had done some electrical work. Mr. Ganz had taken a personal interest in Anita Conant as soon as he learned of their situation, and he reached out to help Jim Conant as a personal friend. Day 3, pp. 177-78 (Mr. Ganz's testimony regarding his contact with Jim Conant in November 2006).

55. Jim Conant sought Mr. Ganz's advice on an informal basis, and, prior to the February 25 meeting, Mr. Conant asked him about his right to terminate Mr. O'Meara under the Fee Agreement. Mr. Ganz explained that, in his view, Jim Conant could terminate Mr. O'Meara without cause and be obligated to pay Mr. O'Meara at his hourly rate. Day 3, p. 147 (Mr. Ganz's testimony about his advice to Jim Conant regarding termination of Mr. O'Meara).

56. In advance of the February 25 meeting, the Conant family had discussed the fact that they were disappointed in Mr. O'Meara's representation. Anita Conant had expressed a desire to terminate Mr. O'Meara's services. Jim Conant was not ready to terminate Mr. O'Meara. The family determined in advance that they needed to confront Mr. O'Meara about his fee and see if they could get him to renegotiate the one-third contingency. *See*, *e.g.*, Day 1, pp. 115, 129-31 (Jim Conant's testimony about these issues); Day 2, p. 10 (Anita Conant's testimony that she "wanted to fire Tim").

57. During the meeting on February 25, 2005, the following people were present: Mr. O'Meara, Craig Conant, Jim Conant, Anita Conant, their three children, Sean, Todd, and Ashley, and a friend of the Conant family, Sarah Sullivan. Answer at ¶ 60.

58. Mr. O'Meara began by discussing the mediation and what they could expect to happen there. Not long thereafter, Jim Conant began discussing the financial numbers and the amount the family anticipated that Anita Conant would need. *See*, *e.g.*, Day 1, pp. 129-33 (Jim Conant's description of beginning of February 25 meeting); Day 2, pp. 30-31 (Sean Conant's description); Day 2, pp. 78-80 (Sarah Sullivan's description); Day 3, pp. 75-76 (Craig Conant's description).

59. Jim Conant discussed the family's concerns with respect to Mr. Davis's pending Motion to Enforce Settlement Agreement. Mr. O'Meara assured them that the case law was on their side. Mr. O'Meara also stated that he felt they were in a good position to have Lyons & Hohl offer an amount to settle in excess of the policy limits. Answer at ¶ 62.

60. Jim Conant brought up the question of what Mr. O'Meara's fee would be in the event that the settlement was only for the policy limits. Answer at ¶ 63.

61. At one point Mr. O'Meara responded that he would be willing to reduce his fee by $500,000.00. Jim Conant became very angry and stormed out of the room. Answer at ¶ 64.

62. At some point during the discussion of Mr. O'Meara's fee, Craig stated something to the effect that he had spoken with people who thought a $2 million fee was reasonable for the case. Neither Jim Conant, nor any of the other Conants, responded to Craig's comment. *See*, *e.g.*, Day 2, pp. 79-80 (Sarah Sullivan's description of this incident); Day 3, pp. 82-83 (Craig Conant's description of the reaction to his $2 million proposal: "well, I might as well have thrown it against a brick wall").

63. During the heated exchange, Anita Conant mouthed the following words to Mr. O'Meara, which Sean was able to translate: "Tell me why I should not fire you now?" Day 4, p. 82 (Mr. O'Meara's testimony that, at February 25 meeting, Anita Conant asked, "Tell me why I shouldn't fire you now").

64. Sean Conant asked Mr. O'Meara: "What would happen if we fire you?" Mr. O'Meara stated litigation "gets ugly" and is "an unhappy result for everyone." Answer at ¶ 67.

65. During the heated exchange, Ms. Sullivan suggested that Mr. O'Meara agree to start from scratch and renegotiate the Fee Agreement. Mr. O'Meara refused to renegotiate the Fee Agreement in that manner. Day 4, p. 83 (Mr. O'Meara's testimony that he refused to accept Sarah Sullivan's proposal to renegotiate the entire Fee Agreement); Day 2, p. 82 (Sarah Sullivan's testimony regarding same).

66. Ms. Sullivan then proposed to Mr. O'Meara that they strike the paragraph containing the one-third contingent fee and renegotiate the percentage of the fee. Mr. O'Meara suggested that they write in the phrase, "to be negotiated." Answer at ¶ 69.

67. There was a consensus in the room that the phrase "to be negotiated" was acceptable to everyone. Mr. O'Meara had previously removed the Fee Agreement from his briefcase. Answer at ¶ 70.

68. Mr. O'Meara crossed out Paragraph C(1), the paragraph containing the one-third contingent fee, and wrote in its place, "to be negotiated." Mr. O'Meara wrote his initials next to the changes, and Jim Conant also initialed the document. Exh. 37. Ms. Sullivan carried the document upstairs to make copies of the document. Answer at ¶ 71.

69. After noticing that the changes were not dated, Ms. Sullivan brought the document back downstairs to have Mr. O'Meara place the date next to his initials. (The amended Fee Agreement at Exh. 37, is hereinafter referred to as "February 25 Amendment"). Answer at ¶ 72.

70. After the February 25 Amendment was finalized, they watched a video about Anita Conant entitled, "A Day In The Life," that was prepared by Mr. O'Meara to show at the mediation. Answer at ¶ 73. After the video, Mr. O'Meara said a few more words about

the mediation, and took Anita Conant's hand and told her he "would not let his fee get in the way" and then he and Craig left and returned to Keene together. Day 1, p. 141 (Jim Conant's testimony about what occurred after the video); Day 2, p. 85 (Sarah Sullivan's testimony regarding same).

February 26, 2006: Travel to Philadelphia

71. The next day, Sunday, February 26, 2006, Mr. O'Meara drove from Keene to Philadelphia. Before leaving, he telefaxed to Jim Conant a document entitled, "Memorandum of Understanding Regarding Fees" (hereinafter "February 26 Memorandum"). Exh. 40. The February 26 Memorandum contained at the top the date of February 27, 2006. It was signed by Mr. O'Meara and had a handwritten date of February 26, 2006. Answer at ¶ 74.

72. The February 26 Memorandum states:

> The following memorandum is simply a codification of the verbal representations and commitments made on 2/25/06:
>
> I, Timothy A. O'Meara on behalf of O'Meara Law, PLLC and James E. Conant on behalf of Anita M. Conant, hereby agree, accept and acknowledge that the attorneys fees for legal services rendered in connection with this case (Anita M. Conant and James E. Conant v. Lyons & Hohl Paving, Inc. and Paul Thimm Docket # 05-5807.) for the purpose of resolving this matter at settlement conference on 2/27/06 or subsequent settlement resulting therefrom are as follows: If the final settlement offer is no more that (sic) $11,000,000 then the total of all attorneys fees and costs inclusive shall be no more than and no less than: $2,000,000.00.
>
> This modification and compromise of attorneys fees is intended for the purpose of facilitating settlement only. If, for some unforeseen reason, the case goes go (sic) to a trial or is settled during a trial in this matter, then the terms and conditions of our original agreement, dated May 25, 2005 shall apply.

Answer at ¶ 75.

73. On February 26, 2006, Mr. O'Meara sent a similar version of the February 26 Memorandum to Craig Conant, Exh. 39, via email. Answer at ¶ 76.

74. While Mr. O'Meara was in his car traveling to Philadelphia on that date, Jim Conant telephoned him. Answer at ¶ 77. Jim Conant made clear to Mr. O'Meara that the February 26 Memorandum did not reflect their agreement from the day before that his legal fee was "to be negotiated." Jim Conant said he would not sign the February 26 Memorandum. Answer at ¶ 77 (admitting that Jim Conant "said he would not sign" the February 26 Memorandum); Day 1, p. 143 (Jim Conant's testimony: "Yeah, I called him back, and I said, Tim, I don't know what you're doing here. I said, this has nothing to do with what you talked about yesterday, 'to be negotiated.' This is a whole different agreement that you've decided you want us to look at, and I adamantly told him, I will not sign this."); Day 3, pp. 93-94. (Craig Conant's testimony regarding his conversation with Jim Conant after Jim received a copy of the February 26 Memorandum via fax from Mr. O'Meara).

February 27, 2006: The Mediation

75. On Monday, February 27, 2006, Jim Conant flew to Philadelphia with his daughter, Ashley, and Mr. Neville, and they met Craig at the federal courthouse. The mediation was scheduled for 1:30 p.m. that day. Day 1, pp. 144-45 (Jim Conant's testimony regarding his trip to Philadelphia on February 27; Exh. 26 (Order scheduling mediation for February 27 at 1:30 p.m.).

76. On the forefront of Jim Conant's mind was the fact that Anita Conant was scheduled to have surgery on that Friday, March 3, 2006. Jim Conant and the family were deeply worried that Anita Conant might not survive this surgery. Mr. O'Meara was also aware of the serious nature of Anita Conant's surgery scheduled for later that week. Answer at ¶ 79.

77. When they met with Mr. O'Meara at the courthouse, Mr. O'Meara asked to meet with Jim and Craig Conant separately to discuss "housekeeping" matters. Day 4, p. 93 (Mr. O'Meara's testimony that he told them he had "some housekeeping to take care of"). Mr. O'Meara asked Ashley and Mr. Neville to "excuse themselves" and they left the room. Day 4, p. 93 (Mr. O'Meara's testimony that he asked Mr. Neville and Ashley to "excuse themselves" from his meeting with Jim and Craig Conant); Day 2, p. 103 (Richard Neville's testimony: "I was specifically told I wasn't needed.").

78. Mr. O'Meara stated that he was not prepared to go forward with the mediation until the issue of his fee was resolved. Answer at ¶ 81. Mr. O'Meara stated that he wanted to get at least $2 million as a fee or he would not go forward with the mediation. Day 3, pp. 97-98 (Craig Conant's testimony: "In a nutshell, Tim O'Meara had the paperwork in front of him of the new fee agreement that he wished to have Jimmy sign. And he basically said, Jim, I can't go forward with this case unless I have an agreement for this $2 million. And he pushed it across the table to Jimmy, and Jimmy was, like, I thought we had a "to be negotiated" later on. Why we (sic) are doing this now at the 11th hour? We've got to walk into the hearing here in a few minutes. So Jimmy and I got up and walked out of the room at that point there to discuss this. Q. Okay. Did Mr. O'Meara say anything else about

signing the document? You said he said I've got to get $2 million? A. Or I can't move forward. He couldn't move forward and represent Jimmy that day if he couldn't, and there was no way Jimmy would be able to get — get this taken care of today, meaning the 27th, if Tim wasn't present.").

79. Mr. O'Meara presented the February 26 Memorandum. Answer at ¶ 82. Jim Conant was very upset and left the meeting to call his family. Day 1, p. 148 (Jim Conant's testimony: "Well, I was pretty upset, to say the least, because you know, I was a little nervous just being in a federal courthouse to begin with, the idea of this mediation, the idea of Anita going into surgery, and it was, you know, a lot things going on. And for him to pull yet another 11th hour thing about fees on us was, like, you've got to be kidding me. You can't be doing this. This can't be real. You know, Tim, you said you'd never let your fee get in the way of what Anita needed. If you're so confident in what we're going to be able to do in mediation, why is it that we have to have something like this? And I said, I've got to leave. I was so mad, I had to leave. And I went — I got out of that room, and I went down the hall and I called back up to New Hampshire to speak to Anita and whoever was there to be able to communicate with her for me."); Day 3, p. 98 (Craig Conant's testimony: "Jimmy and I — he's — Jimmy's extremely upset at this point here and he's going, what are we going to do? And it was — you know, it was a bomb."); Day 4, p. 192-93 (Mr. O'Meara's testimony that Jim Conant said: "Geez, I can't believe this is happening. I'm going to have to talk to - - talk to Sean and Anita.").

80. After telephoning his family, Jim Conant returned to the meeting with Mr. O'Meara. Jim Conant felt that he was under great pressure to negotiate an agreement with Mr. O'Meara,

as he feared that Mr. O'Meara would refuse to represent him at the mediation without an agreement. Jim Conant concluded that he had no other choice but to sign an agreement, and he told that to Mr. O'Meara. Day 4, p. 193 (Mr. O'Meara's testimony conceding this: "He said, 'I feel like I don't have any choice but to sign the agreement.' "); Day 1, pp. 149-53 (Jim Conant's testimony about this incident); Day 3, pp. 98-99 (Craig Conant's testimony regarding the same).

81. Mr. O'Meara placed in front of Jim Conant for his signature a version of the February 26 Memorandum with handwritten changes that he had made to it (hereinafter "February 27 Agreement"). Mr. O'Meara's signature was already on the February 27 Agreement, with a February 26 date. Answer at ¶ 86.

82. Mr. O'Meara initialed the handwritten changes, and Jim Conant signed and dated the February 27 Agreement. Exh. 40. Jim Conant did not initial the changes. Jim Conant wrote the date, 2/26/06, next to his signature by mistake. Answer at ¶ 88.

83. Mr. O'Meara did not make a photo copy of the February 27 Agreement for Jim Conant on that date. Answer at ¶ 89.

84. What follows is the text of the February 27 Agreement, Exh. 40, with a strike-through representing the handwritten strike-through that Mr. O'Meara made on the document, and the bold text representing the handwritten notations that Mr. O'Meara added to the document:

> The following memorandum is simply a codification of the verbal representations and commitments made on 2/25/06:
>
> I, Timothy A. O'Meara on behalf of O'Meara Law, PLLC and James B. Conant on behalf of Anita M. Conant, hereby agree, accept and

> acknowledge that the attorneys fees for legal services rendered in connection with this case (Anita M. Conant and James B. Conant v. Lyons & Hohl Paving, Inc. and Paul Thimm Docket # 05-5807.) for the purpose of resolving this matter at settlement conference on 2/27/06 or subsequent settlement resulting therefrom are as follows: ~~If the final settlement offer is no more that (sic) $11,000,00 then t~~The total of all attorneys fees and costs inclusive shall be no more than and no less than: $2,000,000.00 **for all settlements up to 14.5 m then 20% for all amounts recovered over 14,500,00 (sic).**
>
> This modification and compromise of attorneys fees is intended for the purpose of facilitating settlement only. If, for some unforeseen reason, the case goes go (sic) to a trial or is settled during a trial in this matter, then the terms and conditions of our original agreement, dated May 25, 2005 shall apply.

Answer at ¶ 90.

85. The mediation took place after Jim Conant, Craig and Mr. O'Meara concluded their meeting regarding the February 27 Agreement. Answer at ¶ 91.

86. The mediation occurred as scheduled. During the mediation, Judge Strawbridge, who acted as the mediator, informed Mr. O'Meara that he had reviewed the financials of Lyons & Hohl, and verified the defendants' assertion that the maximum amount in excess of the policy limits that it could put on the table was $500,000. The Judge verified that, if the defendants were forced to pay more than $500,000, Lyons & Hohl would likely declare bankruptcy. Answer at ¶ 92.

87. At the end of the mediation, the settlement offer from the defendants was $11.5 million, which equaled the policy limits, plus $500,000 from Lyons & Hohl. The defendants agreed to keep the offer on the table until Thursday, March 2, 2006, at noon. Answer at ¶ 93.

88. Upon his return home, Jim Conant discussed with the family the manner in which Mr. O'Meara had handled the mediation, including the meeting beforehand, and they all decided that Jim Conant should terminate him. Day 1, pp. 163-64 (Jim Conant's testimony about decision to fire Mr. O'Meara after the mediation).

February 28, 2006: Decision to Terminate Mr. O'Meara

89. On Tuesday, February 28, 2006, Jim Conant telephoned Mr. Ganz to discuss what occurred at the mediation. Jim Conant asked Mr. Ganz to communicate on the family's behalf with Mr. O'Meara, and inform Mr. O'Meara that his services were being terminated. Day 3, p. 186 (Alan Ganz's testimony: "I called Mr. O'Meara. Q. Okay. And tell us about that conversation. A. I told him that the Conants were very dissatisfied, that they wanted to terminate his contract . . . .").

90. On that date, Mr. Ganz telephoned Mr. O'Meara and informed him that the Conants were terminating his services and that they intended to pay him his hourly rate. Mr. O'Meara referred Mr. Ganz to his attorney, David A. Garfunkel, Esq. Day 3, p. 186-87 (Alan Ganz's testimony: "I told him that the Conants were very dissatisfied, that they wanted to terminate his contract, that based on his contract, it was my opinion that he would be paid $275 an hour, or in quantum meruit, and that he responded, no, I'm getting $2 million. And I asked him how that was possible, and he said, speak to my attorney. I asked him who his attorney was and he told me David Garfunkel.").

91. On Wednesday, March 1, 2006, Anita Conant was taken to Massachusetts General Hospital to make preparations for her surgery on Friday. Answer at ¶ 97.

92. During that week, Mr. Ganz attempted on behalf of Jim and Anita Conant to negotiate a settlement of their fee dispute with Mr. O'Meara, who was represented in those negotiations by Mr. Garfunkel. These negotiations were not successful. Answer at ¶ 98.

93. The defendants agreed to extend until Friday, March 3, 2006, at 4:00 p.m., the deadline for acceptance of the settlement offer. Answer at ¶ 100.

94. On or about Friday, March 3, 2006, Jim Conant and the family decided it was in their best interests to accept the $11.5 million settlement offer, as they feared that Lyons & Hohl would take the additional $500,000 off the table if the settlement was not accepted by the March 3, 2006, deadline. Day 1, p. 165 (Jim Conant's testimony regarding the decision to settle the case).

95. Following a conference call between all parties with Judge Strawbridge on March 3, 2006, the Judge scheduled a further settlement conference for Monday, March 6, 2006. Answer at ¶ 102.

96. Jim Conant spent the weekend searching for an attorney to represent him and Anita Conant, and retained Leonard A. Busby, Esq., from a Philadelphia law firm. Day 1, pp. 170-71 (Jim Conant's testimony about retaining Mr. Busby over the weekend).

97. By letter to Mr. O'Meara dated March 5, 2006, Exh. 45, Jim Conant terminated his services and requested, pursuant to Paragraph D of the Fee Agreement, an itemized hourly bill for his services. Answer at ¶ 104.

March 6, 2006: Settlement Reached

98. On March 6, 2006, Judge Strawbridge resumed the settlement conference in the federal courthouse in Philadelphia. On that date, Mr. O'Meara filed a withdrawal as counsel for

Jim and Anita Conant. Mr. Garfunkel filed an appearance on behalf of Mr. O'Meara, and Mr. Busby appeared for Jim and Anita Conant. Answer at ¶ 105.

99. The parties settled the underlying personal injury action for $11.5 million. Answer at ¶ 106.

100. The Conants and Mr. O'Meara agreed to handle the fee dispute as follows: Mr. O'Meara would receive $750,000 as an undisputed fee, and $1,250,000 would be placed in escrow and its distribution determined through arbitration. Answer at ¶ 107.

November 2006: Arbitration of Fee Dispute

101. The arbitration occurred over five days, November 27, 28, 29, 30, and December 1, 2006, at the law firm of Devine, Millimet & Branch in Manchester. Answer at ¶ 108.

102. James P. Bassett, Esq., and Jennifer A. Eber, Esq., represented the Conants at the Arbitration. Answer at ¶ 109.

103. The majority decision held that Mr. O'Meara should receive a total fee of $1,587,000. Thus, the $1,250,000 in escrow was divided such that Mr. O'Meara received $837,000, and the Conants received $413,000. Answer at ¶ 110.

104. First, Mr. O'Meara testified falsely about the manner in which the February 25, 2006, meeting ended. *See* Notice of Charges at ¶ 171.

105. Mr. O'Meara testified that, on February 25, after the February 25 Amendment was finalized, and they watched the "Day in the Life" video, Mr. O'Meara had further discussions with the family about his fee. Mr. O'Meara testified that, after the video, Mr. O'Meara proposed to the family that, in the event that the total settlement was for no

more than the policy limits, he would reduce his fee to $2 million. Mr. O'Meara testified that, before he departed, the family agreed to his proposal and thanked him. Answer at ¶ 115.

106. Mr. O'Meara's testimony about this $2 million agreement with the family at the end of the February 25 meeting was false. Mr. O'Meara testified falsely so that the arbitrators would form the impression that on February 25, the family had agreed to the $2 million fee demanded by Mr. O'Meara at the February 27 mediation. *See* Days 1-4 (every witness except Mr. O'Meara testified that Mr. O'Meara did not renegotiate his fee <u>after</u> the February 25 Amendment was initialed and copied); Day 1, p. 141 (Jim Conant's testimony: "Q. Between the time that Exhibit 37 was initialed and copied and passed around and Tim O'Meara's departure from your house on February 25, was there any further discussion of Tim's fee? A. No, there was not."); Day 2, p. 13 (Anita Conant's testimony: "Q. Anita, between the "to be negotiated" agreement that was signed, the amended fee agreement, between that time and Tim O'Meara's departure from your house that night, or that day, did Tim O'Meara ever try to renegotiate his fee with the family? A. No. Q. After the amended fee agreement was initialed and copied and handed out by Sarah Sullivan, was there any further negotiation or agreement regarding Tim O'Meara's fee? A. No."); Day 2, p. 45 (Sean Conant's testimony: "Q. Okay. And between the time of the Sarah Sullivan negotiations, if you will, between the time of that and the time Tim O'Meara left, did Tim O'Meara — were there any further discussions about Tim's fee? A. No, not about his fee; Day 2, p. 86 (Sarah Sullivan's testimony: "Q. Okay. Between the time you handed out copies of Exhibit 37 and the time that Tim left the house, did Tim

ever try to renegotiate his fee? A. No. Q. Between the time you handed out copies of Exhibit 37 and Tim leaving the house, did Tim ever bring up the 2 million number again? A. No."); Day 3, p. 88 (Craig Conant's testimony: "Q. Just to be clear, after the fee agreement was to be negotiated, was there any further discussion about the 2 million number or the fee? A. No, that was put to rest."); Day 4, p. 14 (Todd Conant's testimony: "Q. Let me read this and tell me if I'm reading it correctly, Todd. Question, "Based on your memory of that meeting, is it possible Tim could have left that meeting thinking 2 million was the agreed upon number?" And you answered, "Not reasonably, because he had signed — they had initialed — dad and him had initialed the document that said it was to be negotiable, and that's how it was left." Did I read that correctly? A. I'd have to read it myself because this is the first time I'm seeing it, so — yeah, that's correct. It was to be negotiable.").

107. Mr. O'Meara described the December 1, 2005, visit to Hampton by Mr. Davis and an insurance adjustor. Answer at ¶ 119. Mr. O'Meara accurately described that visit as a positive one for the Conants, as Mr. Davis had great sympathy for Anita Conant and even shed a tear when Anita Conant mouthed the words "help me" to him. Day 4, p. 203 (Mr. O'Meara's Arbitration Hearing testimony about the December 1, 2005, meeting).

108. Mr. O'Meara stated that, after Mr. Davis and the insurance adjustor left the home, Mr. Conant and Sean Conant said to Mrs. Conant: "You should have won an Emmy for that performance." Answer at ¶¶ 119, 120.

109. On or about January 13, 2006, Mr. O'Meara had further discussions with Mr. Davis about settlement. On that same date, January 13, 2006, Mr. O'Meara also had a conversation

with his client, Mr. Conant. Mr. Conant made clear to Mr. O'Meara that Mr. O'Meara was not authorized to settle the case for the policy limits. Mr. Conant told Mr. O'Meara that, if the policy limits were offered, neither he nor Mrs. Conant would accept that offer. Answer at ¶¶ 128, 131.

110. As of the date of his December 8, 2005, letter to Mr. Davis, Mr. O'Meara did not have authority from his clients to settle the case, or to offer to settle the case, for the policy limits. Answer at ¶ 135.

111. At all times, Mr. O'Meara was aware that he had not kept time records on the case. Answer at ¶ 149.

II. Rulings of Law

The Committee finds that the following rule violations, as cited in the Preliminary Hearing Panel Report and Hearing Panel Report, are established by clear and convincing evidence. The rulings are as follows:

Rule 1.2(a): Scope of Representation

N.H. Rule Prof. Conduct 1.2(a) states in pertinent part:

> A lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

One of the objectives was whether and on what terms the case would be settled. Mr. O'Meara failed to abide by his clients' directives, he also ignored them by stating to Mr. Davis, who represents Cincinnati Insurance, that the Conants had agreed to settle for the policy limits.

Mr. O'Meara also told opposing counsel that in exchange for payment of the policy limits, the Conants would settle the case and provide each defendant with a full release.

Mr. O'Meara violated his Rule 1.2(a) obligations to his clients by communicating an offer to settle for the policy limits in his letter dated December 8, 2005, and in subsequent communications between that date and January 24, 2006.

Rule 1.7(b): Conflict of Interest

N.H. Rule Prof. Conduct 1.7(b) provides in pertinent part:

> A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Mr. O'Meara had a duty to represent the Conants under circumstances that would not be materially limited by his own personal interests. From January 2006 through February 2006, Mr. O'Meara's relationship with his clients had deteriorated such that the Conants discussed terminating his services. Mr. O'Meara told the Conants that he would sue for his 1/3 contingency fee and "would win."

A meeting was held with Mr. O'Meara, the Conant family, as well as Craig Conant and Sarah Sullivan, in which the contingency fee agreement was ultimately amended to read "to be negotiated" in order for the Conants to achieve a result closer to Mrs. Conant's life care needs.

Mr. O'Meara continued his attempts to secure a two million dollar fee for his representation by further amending the agreement on or about February 26, 2006, and, absent

agreement by Mr. Conant, he threatened to withdraw as counsel on the morning of mediation. Mr. O'Meara's representation was materially limited by the conflict of interest between his demands for compensation and his clients' need to achieve a settlement in line with Mrs. Conant's life care needs.

Rule 8.4(c)(1): Deceit and Dishonesty

N.H. Rule Prof. Conduct 8.4(c)(1) states in pertinent part:

> It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Mr. O'Meara violated Rule 8.4(c)(1) when he testified at the arbitration hearing of the underlying fee dispute. He falsely portrayed the Conants (at the end of the February 25 meeting) as having agreed to Mr. O'Meara's suggestion that his fee would be $2 million in the event of a settlement for the policy limits. Mr. O'Meara knew at the time that he testified that his testimony in this respect was false. Mr. O'Meara testified falsely in order to induce the arbitrators to believe that the Conants had agreed on February 25 to the essential terms of what later became the February 27 Agreement.

Rule 8.4(a): General Rule

N.H. Rule Prof. Conduct 8.4(a) reads in pertinent part:

> It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct.

In light of the above rule violations, there is necessarily clear and convincing evidence of a violation of Rule 8.4(a).

III. ANALYSIS

Having made the above-referenced findings of fact and rulings of law, we conclude that the appropriate sanction is a two year suspension. In making this recommendation, the Committee is mindful of Disciplinary Counsel's request for disbarment, and we have carefully reviewed the Hearing Panel Report with its conclusion that Mr. O'Meara should be disbarred. We have considered that as a sole practitioner it will be difficult for Mr. O'Meara to restart his practice after a two year absence. We also note that disbarment is not "permanent," and the Rules do not specify a time at which an attorney may apply for readmission. In theory, such an application for readmission could be made in less than two years.

When determining what sanction to impose, including the ultimate sanction of disbarment, the Court will focus not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future. The Court will "consider the case on its own facts and circumstances in deciding the sanction." *Morse's Case*, ____ N.H. ____ (decided July 20, 2010). The sanction must take into account the severity of the misconduct. *Coffey's Case*, 152 N.H. 503, 513 (2005).

The Committee looks to the *American Bar Association's Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") for guidance, although the Court has not formally adopted them. *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 first prong of the analysis requires us to identify the duties violated. Mr. O'Meara violated his duties to his clients as he did not abide by his clients' directives by stating to Mr. Davis, representing Cincinnati Insurance, that the Conants had agreed to settle for the policy limits. Mr. O'Meara also violated his duty to avoid operating under a conflict of interest. A conflict between Mr. O'Meara and the Conants emerged in January 2006 in conjunction with settlement discussions and a dispute over the legal fees. Finally, Mr. O'Meara engaged in conduct involving dishonesty in his testimony at the arbitration hearing and before the Hearing Panel.

The second prong of the four-part analysis requires an assessment of Mr. O'Meara's mental state. His mental state may be one of intent, knowledge, or negligence. As to the representation issue under Rule 1.2, Mr. O'Meara knew that the life plan specified more than $15,000,000, an amount in excess of the policy limits, when he sent the demand letter on December 8, 2005, and that his clients had not authorized settlement as reflected in the letter to Mr. Davis. We have concluded that Mr. O'Meara knew at the time that he testified at the arbitration that his testimony was false. Mr. O'Meara testified falsely to induce the arbitrators to believe that the Conants had agreed to a two million dollar fee.

The conflict issue under Rule 1.7(b) was described by Disciplinary Counsel at oral argument as "the heart of the case." Tr. P. 7, Line 19. Based on the facts, the Committee concludes that Mr. O'Meara could not have reasonably believed that his representation of the Conants would not be adversely affected by his conduct in defense of and pursuant to his own

interests. Accordingly, Mr. O'Meara knew or should have known of the conflict that arose in this case. *See, Wyatt's Case*, 159 N.H. 285 (2009).

The third prong of the analysis requires consideration of the actual or potential injury caused by Mr. O'Meara's misconduct. Mr. O'Meara's conduct caused harm to the attorney-client relationship with the Conants and to the reputation and integrity of the legal profession. It was fortuitous for Mr. O'Meara that the Conants recovered the policy limits and an additional $500,000. However, it was unlikely that the Conants would recover a greater amount based on the order of Judge Strawbridge, who conducted an "in camera" review of the defendant's ability to pay any judgment in excess of the available insurance limits. *See* Exh. 50 (Order of Judge Strawbridge, April 25, 2006).

Turning to the *Standards*, as to Mr. O'Meara's breach of duty to avoid a conflict of interest with his clients, **Section 4.3: Failure to Avoid Conflicts of Interest** is applicable:

> 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
>
> (a) engaged 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 ...
>
> 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 Reprimand [public censure] 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 Admonition [reprimand] 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.

The Hearing Panel found that Mr. O'Meara acted intentionally and knowingly with respect to each of the Rules violations. Mr. O'Meara's failure to acknowledge the self-evident conflict constituted either a knowing or, at best, a grossly negligent failure to competently represent his client. The conflict in this case was not evident when the representation of the Conants was undertaken shortly after the accident in 2005. Rather, developments that were unforeseen created a conflict in the midst of representation stemming from a fee dispute. Upon consideration, the Committee finds that the generally appropriate baseline sanction pursuant to the *Standards* is a suspension.

The following **Section 5.1**, entitled **Failure to Maintain Personal Integrity** is applicable with regard to the deceit charge:

> 5.11 Disbarment is generally appropriate when:
>
> (b) a lawyer engages in any intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.13 Reprimand [public censure] is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
>
> 5.14 Admonition [reprimand] is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

The deceit charge arises initially from Mr. O'Meara's participation in the arbitration. Mr. O'Meara's counsel contested the deceit charge and took the position at the sanction hearing and

at oral argument that there was no intent to deceive the arbitration panel. Rather, he argued that there was a misunderstanding. Mr. O'Meara left the meeting with the Conants, thinking he had an agreement. (Tr. P. 40, L. 5 – 9).

As to the violation of Rule 1.2(a), the most relevant *Standard* is **Section 7.0, Violations of Duties Owed as a Professional**. Rule 1.2(a) requires lawyers to abide by their clients' decisions with respect to settlement of a case. Application of this section does not change the Committee's analysis that the appropriate sanction is a two year suspension.

The final step of the sanction analysis is to consider aggravating and mitigating factors. One mitigating factor in this case is delay in disciplinary proceeding. Based on the docket number (#07-004), it appears that this matter was commenced in early 2007. Given the complexity of this case, the delay is given little weight. Aggravating factors include Mr. O'Meara's prior disciplinary record, his refusal to acknowledge the wrongful nature of his conduct, and his substantial experience in the practice of law. *Standards* § 9.22.

Mr. O'Meara's prior disciplinary record is noteworthy. In 2003, the New Hampshire Supreme Court imposed a public censure for pursuing a modification of custody of Mr. O'Meara's two minor children, and the Court found that he made false statements of material fact to the tribunal. S*ee O'Meara's Case*,142 N.H. 602 (2003). The Court noted that the ethics violations arose from divorce and "custody" proceedings with Mr. O'Meara's former wife, and the circumstances were not likely to repeat themselves. Other aggravating factors include Mr. O'Meara's substantial experience in the practice of law, refusal to acknowledge wrongful nature of his conduct, and his selfish motive.

Personal injury cases handled on a contingent fees basis can be unpredictable with risks

to both the attorney and the client. Often it is difficult to assess these risks at the beginning of the representation. Although a client may suffer serious injuries, there may be issues of liability. The ability of a defendant to pay on a claim may be unknown and depends, for instance, upon the availability of insurance. Anita Conant suffered devastating injuries which Disciplinary Counsel described at oral argument. The Conants' case evolved quickly and held the opportunity to be extremely profitable for Mr. O'Meara under circumstances that happen rarely in a lawyer's career, if at all. There was a confluence of three factors: significant damages, undisputed liability, and a "deep pocket" with insurance. The Conants signed a standard fee agreement with Mr. O'Meara for fees of 33.3% of the gross award. He learned almost immediately that liability was not contested and that there was insurance of $11,000,000. The Conants also learned that given the serious nature of Anita's injuries and the life time care needed, the projected associated costs were well in excess of the insurance available. They realized that if Mr. O'Meara took one-third of the settlement with relatively little effort invested, they would be compromising Anita's present and future care. For his part, Mr. O'Meara did not want a significant fee to slip away because if he were terminated there was the possibility of being paid on an hourly basis and he kept few timekeeping records.

The attorney-client relationship was derailed when Mr. O'Meara wrote in December 2005 to Mr. Davis, representing the insurance company, and demanded the policy limits. Mr. O'Meara did not have his client's authorization for such a settlement proposal although his letter does indicate that Jim Conant was sent a copy. Thereafter, the relationship between the Conants and Mr. O'Meara rapidly deteriorated and a conflict of interest emerged. Ultimately, the underlying dispute was resolved through alternative dispute resolution (ADR) with a Court

supervised settlement conference facilitated by Judge Strawbridge in the U.S. District Court in Pennsylvania. (*See* Order on settlement, Trial exhibit 50). Mr. O'Meara's violation of Rule 8.4(c) involves a false statement to an arbitration panel regarding the fee dispute.

IV. SANCTION

For all the above reasons, the Committee voted to recommend that Mr. O'Meara be suspended from the practice of law for two years.

V. CONCLUSION

The Committee hereby directs Disciplinary Counsel to file a Petition with the New Hampshire Supreme Court for a two year suspension. The Committee voted to assess all costs associated with the investigation and prosecution of this matter, with payment in full prior to reinstatement.

August 23, 2010

Benette Pizzimenti
Vice Chair

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