

New Hampshire Supreme Court  
**Professional Conduct Committee**

*a committee of the attorney discipline system*

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*McGrath, Peter G. advs. Wayne C. McCutcheon # 08-058*

**REISSUED SIX MONTH SUSPENSION STAYED FOR ONE YEAR**

On February 15, 2011, the Professional Conduct Committee deliberated the above captioned matter with regard to Respondent's Request for Reconsideration and Brief Supplement to Motion to Reconsider. Members present included: Toni M. Gray, Vice Chair and Chair of the matter, Susan R. Chollet, David N. Cole, Alan J. Cronheim, Gerald A. Daley, Julie A. Introcaso, James R. Martin and Lawrence A. Vogelman. Thomas P. Connair and Richard H. Darling were absent. Margaret H. Nelson, Chair and Benette Pizzimenti, Vice Chair were recused. The Committee grants the Request for Reconsideration and hereby reissues the decision.

On October 19, 2010, the Committee deliberated the above captioned matter. Members present included: Toni M. Gray, Vice Chair and Chair of the matter, Susan R. Chollet, David N. Cole, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, Julie A. Introcaso, James R. Martin and Lawrence A. Vogelman. Benette Pizzimenti and Thomas P. Connair were absent. Margaret H. Nelson, Chair, was recused and not present.

This Order supplements the Committee's Preliminary Order of September 27, 2010. That Order's Findings and Rulings are as follows:

## **I. FINDINGS OF FACT**

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

1. Mr. McGrath is an attorney licensed to practice law in New Hampshire. Mr. McGrath was admitted to practice in 1988. At all times material to this proceeding, Mr. McGrath operated his law office as McGrath Law Firm, 20 Montgomery Street, Concord, New Hampshire 03301. This matter did not involve Mr. McGrath’s law firm, but concerned a collection case against a limited liability company of which he was a member and manager.
2. On or about January 24, 2005, Mr. McGrath, who personally was a member and manager of Peter & Gary, LLC (“P&G, LLC”), a development company, entered into a verbal agreement with Wayne C. McCutcheon, the owner of Wayne McCutcheon Associates, Inc., of Claremont, New Hampshire, to perform services as a surveyor with respect to certain real property that P&G, LLC owned in Newport. P&G, LLC intended to subdivide the property and sell lots. Mr. McCutcheon was to be paid with a lot or lots in return for his services.
3. On or about May 5, 2007, after the development project did not come to fruition, P&G, LLC terminated the subdivision plans and decided instead to sell the property. As a result, on or about that date, P&G, LLC told Mr. McCutcheon to stop all work on the project.
4. On or about May 18, 2007, Mr. McCutcheon forwarded to Mr. McGrath an invoice for services he had performed for P&G. The balance stated on the invoice was \$7,000.00.
5. Having not received payment from P&G, LLC, on or about January 4, 2008, Mr. McCutcheon forwarded to Mr. McGrath another copy of the invoice, which contained the notation: “Balance past due, please remit.”
6. Having not received a payment from P&G, LLC, Mr. McCutcheon retained R. Wells Chandler, Esq., to represent him in a collection action.
7. Mr. Chandler drafted on behalf of Mr. McCutcheon a Petition to Attach With Notice (“Petition to Attach”), seeking an attachment (securing recovery in the amount of \$8,500.00) against P&G, LLC on the Newport property.

8. On May 21, 2008, the Petition to Attach was served on P&G, LLC's Registered Agent Peter G. McGrath. Mr. McGrath, personally, was not a defendant in that action.

9. The Petition to Attach contained the following "Notice to the Defendant":

THE PLAINTIFF INTENDS TO ATTACH YOUR PROPERTY, AS SET FORTH IN THE ABOVE PETITION FOR PERMISSION TO DO SO, TO SECURE ANY JUDGMENT OR DECREE THE PLAINTIFF MAY OBTAIN IN THIS ACTION. YOU HAVE THE RIGHT TO OBJECT TO THE ATTACHMENT, AND TO HAVE A HEARING AS TO WHETHER IT SHOULD BE MADE. IF YOU DO WISH TO OBJECT, AND HAVE A HEARING, YOU SHOULD FILE A WRITTEN OBJECTION, DETAILING THE REASONS THEREFOR, TOGETHER WITH A REQUEST FOR A HEARING, WITH THE CLERK OF COURT, NOT LATER THAN JULY 1, 2008.

IF YOU FAIL TO OBJECT BY THAT DATE, YOU WILL BE DEEMED TO HAVE WAIVED ANY OBJECTION.

IF YOU TRANSFER ANY PROPERTY AFTER RECEIVING THIS NOTICE, AND BEFORE THE ATTACHMENT, IF ALLOWED, IS MADE, YOU WILL BE SUBJECT TO THE PROVISIONS OF RSA 511-A:6.

EVEN IF YOU DO NOT OBJECT TO THE ATTACHMENT, YOU SHOULD FILE AN APPEARANCE WITH THE CLERK OF COURT BY JULY 1, 2008 UNLESS YOU ARE WILLING THAT THE PLAINTIFF HAVE JUDGMENT BY DEFAULT.

10. On or about May 30, 2008, Mr. Chandler filed the Petition to Attach, along with a Writ of Summons, in the Claremont District Court.

11. The Writ of Summons set forth Mr. McCutcheon's contract claim against P&G, LLC for the unpaid invoice.

12. On or about June 17, 2008, Mr. McGrath filed an Appearance in the case as "Counsel for Peter & Gary, LLC." Mr. McGrath did not file an objection to the pending Petition to Attach.

13. By Order dated June 26, 2008, the Court scheduled a hearing on the merits to occur on September 23, 2008.

14. On July 25, 2008, Mr. McGrath notified Mr. McCutcheon and his counsel of the existence of a potential buyer for the property. In a letter to Mr. Chandler dated July 25, 2008, Mr. McGrath wrote:

This is to request the test pit, subdivision and all other materials be provided. I

understand you are seeking payment for services rendered. Can you please have your client send me the entire file with copies of all the requested information. I have a potential buyer and if I can get this package to him, it would probably help him buy and as I explained to you, even though [Mr. McCutcheon] agreed with me to be paid by being given a lot of land, if we could sell it, I would pay him at the closing table.

In any event, please send me the entire file with all the test pit information, maps, drawings, sketches and anything else you have on the subdivision that may assist with the sale.

Thank you for your cooperation.

15. On August 11, 2008, Mr. McGrath, on behalf of the LLC, sent another letter to Mr. Chandler enclosing a copy of the Purchase and Sales Agreement. In his letter to Mr. Chandler, which contained a caption in bold indicating that the matter was "urgent," Mr. McGrath wrote:

We have an offer to buy the land and it is entirely conditioned upon receiving the perc test data. The perc test data is the work you did and have billed me for. We are happy to have you paid at the closing table, but we need the data immediately.

Note also, we need the wetlands delineation data and any other materials you have on this property. Enclosed is a copy of the purchase and sale.

16. The Purchase and Sales Agreement supplied by Mr. McGrath in his August 11, 2008, letter provided for closing "on or before September 8, 2008." At some point thereafter, a closing was scheduled for August 28, 2008. Mr. McGrath did not apprise Mr. Chandler or Mr. McCutcheon of the scheduled date for closing.
17. On August 28, 2008, P&G, LLC sold the Newport property to buyers at a closing.
18. At approximately 4:30 p.m. on the date of the closing, Mr. McGrath forwarded via fax to Mr. Chandler a copy of an unsigned HUD Settlement Statement that included a disbursement to Mr. McCutcheon of \$1,800.00. Mr. McGrath included the following on the fax cover sheet: "Okay for your client?"
19. On August 29, 2008, Mr. Chandler wrote to Mr. McGrath:

I received your proposed HUD Statement this morning as I was out of the office Thursday afternoon. I contacted Wayne with your request, and he will not agree to a payoff of \$1800 from this closing for a release of his pending attachment. Your proposal to pay at the closing table is for less than what is due and what the expectation was as represented in your recent correspondence. Also, the tardiness of your request without further explanation, communication or negotiation was

not viewed as a good faith offer in resolution of this matter.

20. On September 4, 2008, the Court granted the Petition to Attach. The hearing on the merits of the collection action was still scheduled for September 23, 2008.
21. On or about September 10, 2008, Mr. Chandler received a check from the title company for \$1,800.00, written to Wayne McCutcheon Associates, Inc., as a disbursement pursuant to the terms of the August 28, 2008, closing.
22. In a letter to Mr. McGrath dated September 10, 2008, Mr. Chandler wrote: I received a check from Phenix Title Services, LLC for \$1,800, which is, as you know, not acceptable. I will hold it in my file pending the hearing on this matter.
23. On September 23, 2008, the parties entered into a Stipulation regarding P&G, LLC's payment of Mr. McCutcheon's outstanding invoice. The Stipulation contained the following terms:  
  
NOW COME the parties to the above entitled matter and stipulate and agree as follows:
  1. Judgment for Plaintiff in the amount of Four Thousand Four Hundred Sixty and 00/100 Dollars (\$4,460.00).
  2. Defendant to pay One Thousand Four Hundred Sixty and 00/100 Dollars (\$1,460.00) to Plaintiff by September 30, 2008.
  3. Defendant to pay the balance at the rate of One Thousand Dollars (\$1,000.00) per month on the 20<sup>th</sup> day of each month commencing October 20, 2008.
  4. Peter G. McGrath agrees to personally guarantee the above described payments.
  5. Upon notice from Plaintiff that the judgment has been paid, the docket shall be marked "Neither party, no costs, no further action same cause."
24. Under the terms of the Stipulation, the entire amount due (\$4,460) was to be paid to Mr. McCutcheon by December 20, 2008. The Stipulation was signed by Messrs. Chandler, McCutcheon and McGrath, as well as a witness.
25. On September 29, 2008, the Court approved the Stipulation.
26. Mr. McGrath did not tender the \$1,460 payment due on September 30, 2008. Nor did he make the first monthly installment of \$1000 due on October 20, 2008.
27. On October 23, 2008, having received no payments under the terms of the Stipulation from Mr. McGrath, Mr. McCutcheon filed an Affidavit of Non-Compliance.

28. In an Order dated October 29, 2008, the Court scheduled a Show Cause Hearing on Mr. McCutcheon's Affidavit of Non-Compliance for December 9, 2008.
29. On November 11, 2008, Mr. McGrath filed an Appearance in the matter as "Managing Member of Peter & Gary LLC."
30. On or about December 4, 2008, Mr. McGrath forwarded a further payment to Mr. Chandler: a check written out to Wayne McCutcheon Associates, Inc., in the amount of \$1,400.00. This payment was in addition to the \$1800 paid at closing on the Newport property and approximated the amount that had been due under the terms of the Stipulation on September 30, 2008.
31. On December 9, 2008, the date of the Show Cause Hearing, Mr. McGrath was not present in the courtroom when the case was called. Mr. McGrath had telephoned the Court on the morning of the hearing to inform it that he was going to be late due to weather conditions. The Court entered a default and issued a bench warrant for Mr. McGrath's arrest.
32. On or about December 16, 2008, Mr. McGrath filed a Motion to Lift Default and Void Arrest Warrant ("Motion to Void Warrant"). A copy of the Motion to Void Warrant was sent to Mr. Chandler. In the Motion to Void Warrant, Mr. McGrath wrote:

NOW COMES, Peter & Gary, LLC, *pro se*, by Peter G. McGrath, managing member, and files this Motion to Lift Default and Void Arrest Warrant.

In support thereof, we provide as follows:

1. There was a contempt hearing on December 9, 2008.
2. In good faith, counsel for respondent called the Court at 8:25 a.m. and advised that he would be late due to ice on the road. Counsel appeared at 9:15 a.m.
3. Respondent made a payment of \$1,400 on December 8, 2008. See attached.
4. The remaining debt is to be paid in increments of \$1,000 per month over the next three months, as previously agreed.
5. Respondent has been making payments regularly.
6. Accordingly, there is no need for an arrest warrant and the contempt should be lifted.  
The arrest warrant should be voided.
7. A hearing should be scheduled.
8. Another defendant has been added and he needs to be noticed of the

hearing.

WHEREFORE, Defendant Peter & Gary, LLC prays that this Court:

- A. Lift the Contempt and lift the Default;
- B. Schedule a hearing;
- C. Void the arrest warrant; and
- D. Grant such other and further relief as is just and necessary.

- 33. On December 31, 2008, no objection having been filed, the Court granted Mr. McGrath's Motion to Void Warrant. On that date, the Court also rescheduled the Show Cause Hearing for February 3, 2009.
- 34. On February 3, 2009, Mr. McGrath made full payment due under the terms of the Stipulation and the case was closed.

## II. RULINGS OF LAW

The Respondent and the ADO have stipulated, and the Committee accepts the Stipulation, as to the Rules of Professional Conduct that were violated. The Stipulation establishes these violations by clear and convincing evidence:

### **Rule 3.3(a)(1): Candor Toward the Tribunal**

- 35. At all relevant times Mr. McGrath had a duty of candor to the tribunal.
- 36. Rule 3.3(a)(1) states that a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."
- 37. Mr. McGrath made statements of fact to the Claremont District Court in his Motion to Void Warrant which he knew or should have known were false, as follows:
  - a. In paragraph 5 of the Motion to Void Warrant, Mr. McGrath represented that "Respondent has been making payments regularly."
  - b. In paragraph 4 of the Motion to Void Warrant, Mr. McGrath represented that "the remaining debt is to be paid in increments of \$1000 per month over the next three months, as previously agreed."

38. As of December 18, 2008, the date of his Motion to Void Warrant, Mr. McGrath had not been “making payments regularly” under the terms of the Stipulation. Although Mr. McGrath had paid \$1800 at the time of closing, he had paid (on December 4, 2008) only the \$1400 that was due on September 30, 2008, under the terms of the Stipulation. Mr. McGrath knew or should have known that the Stipulation contemplated complete payment by December 20, 2008, and that, notwithstanding his stated intention to pay the remaining debt in \$1000 monthly increments over the next three months, the timing of Mr. McGrath’s proposed schedule of payment was not “as previously agreed” under the Stipulation.
39. Mr. McGrath’s aforementioned conduct constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.3(a)(1).

**Rule 8.4(a): General Rule**

40. Because there exists clear and convincing evidence that Mr. McGrath violated Rule 3.3(a)(1), there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

On October 19, 2010, Oral Argument was held on the issue of sanction. John S.

Kissinger, Esquire, represented the Respondent; James L. Kruse, Assistant Disciplinary Counsel, represented the ADO. The Respondent was present, as was Mr. Wayne McCutcheon, the Complainant.

**III. ANALYSIS**

The Committee considered the *American Bar Association’s Standards for Imposing Lawyer Sanctions* (2005)(“*Standards*”) support the Committee’s conclusion. Although the Court has not adopted the *Standards* it looks to them for guidance. *Conner’s Case*, 158 N.H. 299, 303 (2009). The *Standards* set forth a four part analysis for courts to consider in imposing sanctions: (a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 155 N.H. 613, 621 (2007)); *Standards* § 3.0. After 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.*

Under the first prong of the analysis, Mr. McGrath violated his duty of candor toward the tribunal. The Committee discussed at great length the concept that at the very least a lawyer must be completely candid and truthful at all times. This requirement has been stressed time after time, and the Court has made clear that this fundamental principle is not subject to discretion. *See In re Morse*, LD-2009-006 (N.H. \_\_\_ July 20, 2010); *Conner's Case*, 158 N.H. 299, 303 (2009).

Under the second prong of the analysis, the Committee found that Mr. McGrath's mental state was one of knowing, rather than one of negligence. As such, the applicable ABA *Standard* is § 6.12:

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Committee found that the Complainant was harmed by the additional court proceeding to enforce the agreement, and the tribunal was harmed by misinformation filed with the court.

Under the third prong of the analysis, the Committee found that Mr. McGrath caused actual harm to the justice system by his misrepresentation to the court about the status of his debt and the actual payment schedule to date. Corrective action was not taken at any time. The Respondent made claims to the Claremont District Court that payments were made regularly. The Committee was convinced that Mr. McGrath either knew or should have known that this representation was untrue.

The Committee determined that the baseline sanction is a suspension. Aggravating factors include three prior warnings: *McGrath, Peter G. advs. Vickie M. DesRoschers # 96-081(1997)*;

*McGrath, Peter G. advs. John R. Samson # 04-034 (2007); and McGrath, Peter G. advs. Allan E. Hart # 05-077 (2008)*, and substantial experience in the practice of law.

The Respondent asserts that because he was acting as his own attorney his representations should be viewed as a mitigating factor. The Rules of Professional Conduct apply to an individual's behavior whether he or she is acting as a private citizen or serving in a professional capacity. *Bruzga's Case*, 145 N.H. 62, 72 (2000); *Astles' Case*, 134 N.H. 602, 605 (1991).

The truthfulness of an attorney's words forms the very bedrock of the judicial system, and confidence in that truthfulness must be justified whether an attorney is appearing on behalf of a client or pro se. *O'Meara's Case*, 150 N.H. 157, 160 (2003). The Committee concludes that Respondent's acting as his own attorney was not viewed as a mitigating factor. The Committee determined that Mr. McGrath's expression of genuine remorse and acceptance of responsibility were mitigating factors.

#### **IV. SANCTION**

The Respondent is suspended from the practice of law for six months, stayed for one year, with expedited processing of any complaint filed during the stay. If a grievance is filed and remains unresolved during the stay, the stay shall be extended until such time as the grievance is resolved.

#### **V. COSTS**

The Respondent has stipulated, and the Committee accepts the Stipulation, that the Respondent shall pay all costs associated with the investigation and prosecution of this matter.

#### **VI. CONCLUSION**

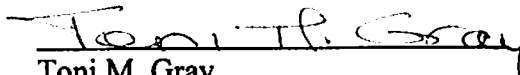
For all of the above reasons, the Committee suspends the Respondent for six months,

stayed for one year, for violating N.H. Rules Prof. Conduct 3.3(a)(1): Candor Toward the Tribunal, and 8.4(a): Misconduct.

## VII. RIGHT TO APPEAL

Pursuant to Supreme Court Rule 37(A)(III)(d)(2)(D)(4)(A), the parties have the right to appeal this decision to the New Hampshire Supreme Court. *See also* Supreme Court Rule 37(3)(c).

March 2, 2011

  
Toni M. Gray  
Vice Chair

### Distribution:

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Wayne C. McCutcheon  
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