

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Clark, Grenville III advs. Heidi L. Gaudreau # 09-027

**RECOMMENDATION TO PETITION THE NEW HAMPSHIRE SUPREME COURT
FOR DISBARMENT**

On February 15, 2011, the Professional Conduct Committee (“Committee”) heard oral argument in the above-referenced matter. Jennifer B. Sargent, Disciplinary Counsel, appeared for the Attorney Discipline Office. The Respondent, Grenville Clark, III, appeared on his own behalf. Mr. Clark is currently under suspension in an unrelated matter.

The following Committee members were present: Margaret H. Nelson, Chair; Benette Pizzimenti, Vice Chair; Toni M. Gray, Vice Chair; Susan Chollet; David N. Cole; Alan J. Cronheim; Gerald A. Daley and James R. Martin. Thomas P. Connair and Richard H. Darling were absent. Lawrence A. Vogelmann was recused and was not present.

The Committee considered the oral arguments and the record, including the Notice of Charges alleging violations of N.H. Rules Prof. Conduct 1.5(b), 3.4(c), 3.3(a)(1) and 8.4(a); the Respondent’s Answer; Disciplinary Counsel’s Exhibits 1 through 40; Respondent’s Exhibits; Parties’ Stipulation of Facts; Disciplinary Record of Grenville Clark, III; Preliminary Hearing

Panel Report; the Transcript of the September 24, 2010 hearing, (referred to as “9/24/2010 Tr.”); and the Supplemental Hearing Panel Report.

The Notice of Charges alleged that Mr. Clark violated Rule 1.5(b) and Rule 3.4(c) for failing to explain his fees and provide a written fee agreement as requested by the Bankruptcy Court to his client. The Hearing Panel concluded that there was insufficient evidence to support a finding on these Rules by clear and convincing evidence. Consequently, the Committee makes no findings of misconduct under these Rules. Nonetheless, given the seriousness of the remaining violations and Mr. Clark’s disciplinary history, disbarment is recommended as explained below.

I. FACTUAL FINDINGS

The Committee accepts both the Stipulation of Facts and the facts found by the Hearing Panel in the Supplemental Hearing Panel Report, by clear and convincing evidence.

1. The Respondent, Mr. Clark, is an attorney licensed to practice law in New Hampshire. Mr. Clark was admitted to practice in September 1971. At all times material to this proceeding, Mr. Clark operated his law office as Gray, Wendell & Clark, P.C., 650 Elm Street, Suite 303, Manchester, New Hampshire 03101-2551.
2. Mr. Clark’s license to practice law in New Hampshire is currently suspended.
3. This attorney discipline matter stems from Mr. Clark’s representation of the Complainant, Heidi L. Gaudreau, in a bankruptcy proceeding.
4. Their attorney-client relationship lasted less than one year. It commenced on or about September 24, 2008, and ended on or about April 7, 2009.

The Initial Consultations

5. In September 2008, Mr. Clark learned of Ms. Gaudreau through her brother, Jay C. Davey, who was, at that time, a bankruptcy client of Mr. Clark. Mr. Davey described Ms. Gaudreau’s situation to Mr. Clark and

asked Mr. Clark to help her.

6. Thus, all of Mr. Clark's initial work on behalf of Ms. Gaudreau occurred in consultation with Mr. Davey.
7. On or about September 22, 2008, Mr. Davey described to Mr. Clark that Ms. Gaudreau needed immediate assistance because the bank that held the mortgage on her boat (including the motor and trailer), Liberty Bank, had filed a replevin action in Rockingham County Superior Court, seeking to seize the boat and trailer. A hearing on the replevin action was scheduled to occur on September 24, 2008.
8. On or about September 23, 2008, Mr. Davey met with Mr. Clark in his office. Mr. Davey requested on behalf of Ms. Gaudreau that Mr. Clark prepare the necessary bankruptcy paperwork for his sister to sign, so that the replevin action could be stayed.
9. In addition to staying the replevin action, Ms. Gaudreau's other goals were to reduce the debts she owed on a home in Atkinson, and on two pieces of personal property, including a truck and the boat (which was the subject of the replevin action).
10. As explained by Mr. Davey, Ms. Gaudreau was interested in a Chapter 13 bankruptcy action, which is a personal financial reorganization that calls for repayments to creditors over time, although not necessarily at 100%.
11. During the conference on September 23 between Mr. Clark and Mr. Davey, Mr. Clark drafted, for Ms. Gaudreau's signature, the bankruptcy petition papers necessary to begin a Chapter 13 proceeding.
12. Mr. Clark filed the bankruptcy petition in the early morning hours of September 24, 2008. The replevin action was stayed as a result of the filing of the petition with the Bankruptcy Court. Mr. Clark then telephoned the lawyer for Liberty Bank and informed him of the stay.

The Legal Fee

13. With respect to the legal fee, Mr. Clark claims that he told Mr. Davey that he would represent Ms. Gaudreau on a retainer basis and he would bill at an hourly rate of \$240.00. Mr. Clark required \$2,000.00 upfront, plus the \$274.00 filing fee.
14. After Mr. Davey met with Ms. Gaudreau to obtain her signature on the bankruptcy papers, Mr. Davey returned the papers to Mr. Clark for filing

on September 24 and tendered a payment of \$2,300.00 in cash.

15. Mr. Clark met in-person with Ms. Gaudreau on October 7, 2008, at his office. After further communications with Ms. Gaudreau regarding her financial matters, Mr. Clark filed the additional and necessary papers to accompany the bankruptcy petition.
16. At their initial meeting on October 7, Mr. Clark gave Ms. Gaudreau a document entitled "Consultation Agreement and Acknowledgement of Receipt of Disclosures and Instructions" (hereinafter referred to as "Consultation Agreement").
17. Attached to the Consultation Agreement was a 3-page document entitled "Contract For Bankruptcy Services," that appeared to be a draft fee agreement (hereinafter referred to as "Draft Fee Agreement").
18. The Draft Fee Agreement that Mr. Clark gave to Ms. Gaudreau was incomplete. It contained blank spaces for the critical information regarding the fee.
19. Mr. Clark asked Ms. Gaudreau to retain and review the Draft Fee Agreement. Mr. Clark intended to ask Ms. Gaudreau to sign a fee agreement after she had a chance to review the Draft Fee Agreement.
20. Mr. Clark never produced a completed written fee agreement for Ms. Gaudreau's review and signature.
21. One of the attachments to Ms. Gaudreau's schedules was a document prepared by Mr. Clark, entitled "Disclosure of Compensation of Attorney For Debtor." The document included a type-written paragraph crafted by Mr. Clark regarding his fees for legal services rendered in the bankruptcy proceeding, as follows:

In a chapter 13 case, the debtor(s) specifically authorize the attorney to deposit into the attorney's firm trust account any refund of plan payments and/or other funds received from the chapter 13 trustee, and to pay from such refund any amounts due for legal fees and expenses incurred in excess of the amounts paid by the debtor(s).
22. Mr. Clark signed the "Disclosure of Compensation of Attorney For Debtor." That document does not contain Ms. Gaudreau's signature.

23. On or about March 3, 2009, Ms. Gaudreau terminated the Chapter 13 case and voluntarily converted it to a Chapter 7 bankruptcy case.
24. At the termination of the Chapter 13 case, the Trustee filed an Interim Report and Account, detailing how he had disposed of Ms. Gaudreau's plan payments, totaling \$718.79.
25. Because the Chapter 13 bankruptcy terminated prior to completion, the Trustee returned all of Ms. Gaudreau's funds. On or about March 6, 2009, The Trustee forwarded \$718.79 to Mr. Clark, and Mr. Clark deposited the funds into his trust account as payment for legal fees. On April 10, 2009, Respondent filed his "Application of Gray, Wendell & Clark, P.C. for Final Approval and Reimbursement of Attorney's Fees and Expenses."

Ms. Gaudreau's Spouse's Income

26. Mr. Clark was aware at the time that he drafted the petition and all its schedules and attachments, that Ms. Gaudreau's spouse had a significant amount of income.

The following facts are drawn from the Hearing Panel report and the record:

11 U.S.C. § 1322 of the United States Bankruptcy Code ("Bankruptcy Code") sets forth the contents of a Chapter 13 Plan and prescribes "commitment periods" for payments by debtors in a Chapter 13 proceeding. Disciplinary Counsel's Exhibit 35 (Title II. Bankruptcy Chapter 13: Adjustment of Debts of an Individual With Regular Income, Subchapter II. The Plan). In order to determine whether a commitment period should not exceed three or five years, subsection (d) of the statute requires disclosure of the monthly income of the debtor and debtor's spouse.

9/24/2010, Tr. 153:21-23; 154:7.

Section 1325(b)(1) of the Bankruptcy Code sets forth the conditions pursuant to which Chapter 13 Plans are confirmed. Disciplinary Counsel's Exhibit 36 (Adjustment of Debts of an Individual With Regular Income; § 1325(b)(1).) It authorizes the Bankruptcy Trustee and unsecured creditors to object to a plan and bars the Court from confirming the plan unless it

provides that all the debtor's projected disposable income to be received in the applicable commitment period will be applied to make payments to unsecured creditors. § 1325(b)(1)(B). The statute provides that the "applicable commitment period" shall be three years or not less than five years depending on the "current monthly income of the debtor and the debtor's spouse" combined. Thus, for a Chapter 13 Plan to be confirmed, there must be a determination of the applicable commitment period based on the debtor and debtor's spouse monthly income. 9/24/2010 Tr. 154:8-22; 155:1-12.

Mr. Clark is an experienced bankruptcy attorney and was aware of the statutory prescriptions discussed above at the time he prepared the Chapter 13 Plan on behalf of Ms. Gaudreau. 9/24/2010 Tr. 152-156:1-13; 199:12-21.

In preparing certain schedules as part of the filing of Ms. Gaudreau's Chapter 13 Plan, Mr. Clark was aware that Ms. Gaudreau was married and that her spouse had income. 9/24/2010 Tr. 126:1-9. He knew that Ms. Gaudreau did not want her husband or his income involved in her bankruptcy proceeding. 9/24/2010 Tr. 126:8-17. She was emphatic that her husband not be involved. Mr. Clark explained that her position would not be a roadblock, because although it "gave some difficulty, but we, I think, tried to figure a way around it." *Id.* Tr. 126:14-17.

Two of the schedules that Mr. Clark prepared as part of the Chapter 13 filing were Schedule I – Current Income of Individual Debtor's and a Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income. (Disciplinary Counsel's Exhibit 9J and 9O, respectively.) Schedule I has two columns, one for a listing of the debtor's income and one for the spouse's income with instructions that "the column labeled 'Spouse' must be completed in all cases . . . by every married debtor whether or not a joint

petition is filed.” (*Emphasis supplied.*) Mr. Clark filled out Schedule I and in the column labeled “spouse” listed Ms. Gaudreau’s spousal income as zero and placed zeros on every line of that column pertaining to spousal income. Mr. Clark, however, on line 13 of that Schedule inserted a statement “(D) Contributions from Spouse” and entered \$2,195 under the column for the debtor.

Mr. Clark also inserted zeros under “Column B Spouse’s Income” when he filled out and filed the Chapter 13 Statement of Current Monthly Income & Calculation of Commitment Period and Disposable Income. Under the heading “Part I. Report of Income” the preparer of this statement is required to “check the box that applies and complete the balance of this part as directed.” Box b entitled “Married” requires the preparer to “Complete both Column A (‘Debtor’s Income’) and Column B (‘Spouse’s Income’) for Lines 2-10”. (Emphasis in the original).

Geraldine Karonis, Esquire, Office of the U.S. Bankruptcy Trustee, testified that on June 3, 2009, she filed a motion to dismiss the petition of Ms. Gaudreau on grounds that it was deficient. 9/24/2010 Tr. 71:16-18; 72:16-18. By that time Mr. Clark had converted Ms. Gaudreau’s Chapter 13 petition to a Chapter 7 petition but he was no longer Ms. Gaudreau’s attorney. As noted by Ms. Karonis a Chapter 7 petition can result in a discharge of all unsecured debts of the petitioner.

One of deficiencies alleged was failure to disclose the spouse’s income. Ms. Karonis testified that Schedule I did not, contrary to instructions in the form, disclose the spouse’s income. 9/24/2010 Tr. 74:20-23; 75:1-11. She also testified that the Chapter 13 Statement, Exhibit 9 O, contained “a lot of discrepancies.” Tr. 77:20-23. Ms. Karonis also stated that in the

“Statement of Financial Affairs” debtors are instructed to provide information for both spouses whether or not a joint petition was filed, unless the spouses were separated. Disciplinary Counsel’s Exhibit 9A (Statement of Financial Affairs). As to the reasons for requiring disclosure of spouse’s income, Ms. Karonis testified that if the debtor had surplus income, a court upon the filing of an appropriate motion would have to rule on whether the debtor would have to pay his or her debts through a Chapter 13 Plan. 9/24/2010 Tr. 76:6-12.

On June 3, 2009, Ms. Gaudreau, *pro se*, filed a Motion for Withdrawal of Bankruptcy Petition, alleging ineptitude and misconduct on the part of Mr. Clark. Disciplinary Counsel’s Exhibit. 24. On July 1, 2009, the Motion to Dismiss filed by the Debtor was granted, and the Court ruled that the U.S. Trustee’s Motion to Dismiss was moot. Disciplinary Counsel’s Exhibit 25.

II. RULINGS OF LAW

The Committee accepted the Hearing Panel’s determinations of Rules violations and concluded that there is clear and convincing evidence that Mr. Clark violated the following Rules of Professional Conduct: 3.3(a)(1) and 8.4(a).

Violations of Rule 3.3(a)(1)

Rule 3.3, Candor Towards the Tribunal, states in pertinent part:

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal . . .

Mr. Clark had a duty of candor to the Bankruptcy Court under Rule 3.3. In addition, the Bankruptcy Code specifically requires lawyers to provide clients with written notice that all

information provided in the petition and during a case is required to be complete, accurate and truthful. 11 U.S.C. §527(2)(A). Here, Mr. Clark knew that Ms. Gaudreau did not want to disclose her spouse's income, and he devised a plan to circumvent the requirements of the Bankruptcy Court. Mr. Clark filed false documents with the Bankruptcy Court with the intent to conceal the income of Ms. Gaudreau's spouse. This concealment caused the U.S. Trustee's office difficulty in determining what resources were available to Ms. Gaudreau. Ms. Karonis filed a motion to dismiss Ms. Gaudreau's petition, and one of the grounds was failure to disclose the spouse's income. As to the potential harm caused by not disclosing spouse's income, it was critical to know what resources were available to Ms. Gaudreau in order to determine whether the pending Chapter 7 petition of Ms. Gaudreau should be converted to a Chapter 13 petition. In the event resources that had been concealed were, in fact, available, then Ms. Gaudreau would be put on a payment plan under Chapter 13 and unsecured creditors would receive some payment on their debts.

Ms. Gaudreau claims that she acted with the best of intentions under the advice of Mr. Clark. She states that Mr. Clark caused her substantial losses including great stress and harm. Mr. Clark had a duty to advise his client of the requirements of the Bankruptcy code and the risks associated with non-disclosure of her spouse's income. He also had a duty of candor to the Court, which is central to the administration of justice. Based on the foregoing evidence, the Committee finds by clear and convincing evidence that Mr. Clark made a false statement of fact to a tribunal in violation of Rule 3.3(a)(1).

Rule 8.4(a): General Rule

Rule 8.4(a) provides in pertinent part:

It is professional misconduct for a lawyer to: (a) 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

The purpose of the Court's disciplinary power "is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future." *E.g., Coffey's Case*, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). "The sanction must take into account the severity of the misconduct." *Id.*

The Supreme Court will look 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.*

Under the first prong of the analysis, Mr. Clark violated the duty to engage in candor toward the tribunal, in that he made false statements of fact to the Bankruptcy Court regarding

Ms. Gaudreau's spouse's income. This is a serious violation.

The second prong of the three-part test requires analysis of Mr. Clark's mental state. Mr. Clark acted with the intent to deceive the Bankruptcy Court with respect to Ms. Gaudreau's spouse's income.

The third prong requires analysis of the injury caused by Mr. Clark's misconduct. Here, Mr. Clark caused harm to the integrity of the legal process by providing false and misleading information to the court in an attempt to make Ms. Gaudreau's available income appear different than it actually was. Mr. Clark presented the false and misleading information in an attempt to induce the Bankruptcy Court to rely on the information and approve Ms. Gaudreau's bankruptcy plan as submitted. Mr. Clark also caused harm to the reputation and integrity of the legal profession by dishonestly perverting the bankruptcy process and manipulating the filing of a bankruptcy petition.

In determining a baseline sanction, the *Standards* provide additional guidance. The applicable standard for misconduct involving failure to comply with a court order is Section 6.1, entitled "False Statements, Fraud and Misrepresentation." which provides:

- 6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.
- 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.

- 6.13 Reprimand¹ is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceedings, or causes an adverse or potentially adverse effect on the legal proceeding.
- 6.14 Admonition² is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual harm or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

As set forth in §§ 6.1, 6.11 of the *Standards*, disbarment is generally appropriate in these types of cases subject to consideration of aggravating or mitigating circumstances as set forth in *Standard 3.0 supra*. The aggravating factors present in this matter, in particular Mr. Clark's disciplinary record, support disbarment. When determining whether to impose 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).

Based on the record in this case there is little in the way of mitigating factors and substantial evidence of aggravating factors. As to mitigating factors, Mr. Clark did cooperate with Disciplinary Counsel up to a point. He met with Landya McCafferty, who was then serving as Disciplinary Counsel, to discuss Ms. Gaudreau's complaint, turned over records and documents to the Disciplinary Counsel's office and entered into a Stipulation of Facts with that

¹ "Reprimand" under the *Standards* is equivalent to a public censure as defined in Rule 37(2)(g).

³ "Admonition" under the *Standards* is equivalent to a reprimand as defined in Rule 37(2)(i).

office. It should be noted, however, this cooperation was his duty as a member of this Bar.

As to the aggravating factors, Mr. Clark, when told by his client that concealment of the income of his client's spouse was important to his client he testified that ". . . gave some difficulty but we, I think, tried to figure a way around it." When Mr. Clark attended a hearing at the Bankruptcy Court with his client on March 14, 2009, he observed his client when questioned by the hearing office at that proceeding, refer to her husband as "a friend" who lived with her and paid her rent or contributed to the expenses. 9/24/10 Tr.: 184:17-23; 185:1-23; 186:1-23; 187:1-14; Disciplinary Counsel's Proposed Findings of Fact and Rulings of Law and Request for Costs), at ¶ 27. He did not correct or offer to correct this statement but acknowledged there was an "ethical rule" obliging him as an attorney to correct the record and to identify Ms. Gaudreau's "friend" as her spouse. 9/24/2010 Tr.187:1-14.

Significantly, there is Mr. Clark's extensive disciplinary record. Since 1991, Mr. Clark has received three reprimands, three public censures and a two year suspension. The most recent sanctions were imposed on January 28, 2010 (suspension) and January 31, 2008 (public censure).

Critical aspects of attorney discipline are to protect the public and maintain public confidence in the bar. When a lawyer commits misconduct of the seriousness and scope of this case combined with a lengthy disciplinary history, the sanction of disbarment is appropriate and necessary. Mr. Clark is currently suspended by order of the Court for two years *Clark's Case* ___ N.H. ___ (April 28, 2010). His continued misconduct and dishonesty in his dealings with the Court leaves disbarment as the only option.

IV. CONCLUSION AND SANCTION

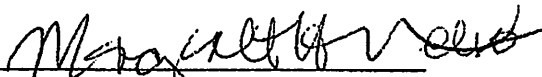
The sanction of disbarment is in accord with the purposes of attorney discipline as described by the New Hampshire Supreme Court *See, e.g., Feld's Case*, 149 N.H. 19, 28 (2002).

The Committee directs Disciplinary Counsel to petition the New Hampshire Supreme Court for Mr. Clark's disbarment from the practice of law, commencing as of the date of the Court's order.

V. COSTS

Mr. Clark is assessed all costs associated with the investigation and prosecution of this matter. *See* N.H. Sup. Ct. R. 37(19).

April 4, 2011


Margaret H. Nelson
Chair

Distribution:

Jennifer B. Sargent, Disciplinary Counsel
Grenville Clark, III
File