

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

Margaret H. Nelson, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray, * Vice Chair
Susan R. Chollet*
David N. Cole
Thomas P. Connair
Alan J. Cronheim

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Gerald A. Daley*
Richard H. Darling*
James R. Martin
Lawrence A. Vogelman

* non attorney member
Holly B. Fazzino, Admin. Coordinator

Hatem, Michael D. advs. Hampshire First Bank # 09-022

PUBLIC CENSURE

The Professional Conduct Committee deliberated the above matter on May 17, 2011.

Members present were Margaret H. Nelson, Chair, Susan R. Chollet, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, James R. Martin and Lawrence A. Vogelman. Toni M. Gray, Vice Chair was absent, Benette Pizzimenti, Vice Chair was not present.

Having reviewed the entire record, including the Notice of Charges, Disciplinary Counsel's Memorandum on Sanction and the Hearing Panel Report, the Committee finds as follows:

I. FINDINGS OF FACT

The Committee finds the following facts were established by clear and convincing evidence:

Mr. Hatem was served with Disciplinary Counsel's Notice of Charges, dated December 7, 2010, by in-hand service from the Sheriff on December 16, 2010. No Answer or Objection was filed by Mr. Hatem. Due to the fact that the Respondent failed to file any responsive pleadings and/or an Answer, the allegations in the Notice of Charges were deemed admitted. Supreme Court Rule 37A(III)(b)(3)(A).

Michael D. Hatem, Esquire, is a New Hampshire attorney who was admitted to the New Hampshire Bar in 1989. Mr. Hatem operated a law office at 215 Main Street, Suite 1, Salem, New Hampshire.

During the course of his law practice, Mr. Hatem represented Hampshire First Bank (“Bank”) with an office located at 80 Canal Street, Manchester, New Hampshire. The Bank engaged Mr. Hatem’s services to assist with the collection of a delinquent loan.

Mr. Hatem filed a Writ of Summons on behalf of the Bank alleging breach of contract, unjust enrichment, and fraud against Xtreme Limousine, LLC (“Xtreme”). Defendant Xtreme filed an Answer and Counterclaim alleging breach of contract, breach of fiduciary duty and conversion.

On or about September 12, 2008, the Defendant propounded Interrogatories to the Bank with a deadline to answer within thirty days. Mr. Hatem was aware that the deadline to answer was October 13, 2008, and so notified the Bank.

After the October 13, 2008 deadline had passed, Mr. Hatem was contacted by Defendant’s counsel on a least two occasions seeking the answers to interrogatories including, November 12, 2008, and again on December 15, 2008. Thereafter, on January 9, 2009, the Defendant’s counsel filed a Motion for Conditional Default.

The Court sent the Notice of Conditional Default on January 20, 2009. Mr. Hatem did not inform the Bank of the Conditional Default.

On January 22, 2009, Mr. Hatem’s assistant sent the Defendant’s counsel a letter enclosing the answers to interrogatories. Mr. Hatem sent a letter to the Bank with a copy of the answers to interrogatories and an original signature page. Mr. Hatem made no mention of the

conditional default, a time limit for the return of the signature page, or a deadline to file a Motion to Strike Conditional Default.

Mr. Hatem never filed a Motion to Strike Conditional Default nor did he provide Defendant's counsel with an executed signature page. The Bank subsequently retained other counsel to review the file at the Court and learned from successor counsel that the case had been conditionally defaulted. The Bank's new counsel was successful in having the conditional default stricken.

It is undisputed that Mr. Hatem did not take reasonable action to prevent the conditional default, did not take action to strike the conditional default and did not notify the Bank of the conditional default.

II. RULINGS OF LAW

The Committee finds by clear and convincing evidence that Mr. Hatem violated N.H. Rule of Professional Conduct 1.3. by:

1. Breaching his duty to act diligently on behalf of his client by his failure to deliver the Bank's answers to interrogatories to Defendant's counsel for over four months, (notwithstanding the fact that the Bank returned the answers to Mr. Hatem within the required thirty days, the date originally specified by Mr. Hatem);
2. Allowing the case to be conditionally defaulted without the Bank's knowledge,
3. His failure to take prompt remedial action to remedy the default.

The Committee finds by clear and convincing evidence that Mr. Hatem necessarily violated N.H. Rule Prof Conduct 8.4(a): Misconduct.

III. ANALYSIS

The Committee considered the American Bar Association's *Standard for Imposing Lawyer Sanctions* (1992) (the "*Standards*"). Mr. Hatem had a duty to deliver the Bank's answers to Interrogatories and Requests to Defendant's counsel within thirty days of the Defendant propounding them, or to move for an extension if the Bank needed one, in order to avoid exposing the Bank to conditional default and final default.

Mr. Hatem breached said duty by: 1) failing to deliver the Bank's answers to Interrogatories and Requests to Defendant's counsel for over four months, notwithstanding the fact that the Bank returned the answers to Mr. Hatem within the required 30 days, the date originally specified by Mr. Hatem; 2) allowing the case to be conditionally defaulted; and 3) allowing the case to reach the final default deadline, all without the Bank's knowledge.

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., Conner's Case*, 158 N.H. 299, 303 (2009). "The sanction must take into account the severity of the misconduct." *Coffey's Case*, 152 N.H. 503, 513 (2005). Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner's Case*, 158 N.H. at 303. 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. The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. *See Conner's Case*, 158 N.H. at 303. Once the baseline sanction is determined, the Court then looks

to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.*

Under the first prong of the analysis, Mr. Hatem violated his duty to act diligently and promptly with respect to his client, First Hampshire Bank. Mr. Hatem did not promptly and diligently deliver the Bank's answers to Interrogatories and Requests, did not act to prevent the case from being conditionally defaulted, and did not promptly inform his client of the conditional default, what caused it, and whether and how he was going to cure the default.

With respect to the second prong of the sanction analysis, the Hearing Panel did not make any finding of fact with respect to whether Mr. Hatem's conduct was done knowingly or negligently, although they concluded in their sanction analysis that his conduct was negligent.

As to the third prong of the analysis, Mr. Hatem's failure caused injury to his client, First Hampshire Bank. Mr. Hatem's dilatory conduct exposed the client to the risk of default. However, given opposing counsel's apparent willingness to accommodate Mr. Hatem, the risk was minimal and, as a practical matter, Mr. Hatem's conduct did not impede Plaintiff's ability to proceed with the case. Mr. Conaton was alarmed when Mr. Merra told him that the case was in conditional default and one day away from potential final default. Mr. Conaton was upset that Mr. Hatem did not make the Bank aware of the case's status. Mr. Hatem's failure to act promptly and diligently ultimately harmed the attorney-client relationship, but did not interfere with or prejudice the end result.

In conjunction with the foregoing assessment, the *Standards* offer material guidance in determining a baseline sanction. Relevant provisions set forth below appear at *Standards* § 4.4, Lack of Diligence:

- 4.41 Disbarment is generally appropriate when:
- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
 - (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
 - (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

- 4.42 Suspension is generally appropriate when:
- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
 - (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

4.43 Reprimand¹ is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.44 Admonition² is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

The Committee concludes that the baseline sanction is suspension under Section 4.42(b).

Mr. Hatem engaged in a pattern of neglect that caused injury or potential injury to his client.

Had Mr. Merra not looked at the file and seen that the case had been conditionally defaulted, the conditional default might have remained unknown to Mr. Conaton. Since the case was within one day of the final default window at the time Mr. Merra discovered the conditional default, Mr. van Zanten could have obtained a default judgment in favor of his client, but for the fortuitous and eleventh-hour discovery of Mr. Merra.

Having determined a baseline sanction, the remaining question is whether there are aggravating or mitigating circumstances that might affect the ultimate sanction. Aggravating

¹ Section 4.43 uses the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

² Section 4.44 uses the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

factors in this case include Mr. Hatem's substantial experience in the practice of law and his prior disciplinary record. In June 2007, Mr. Hatem received a Reprimand for failure to turn over a client file, in violation of Rule 1.16(d). *See Hatem, Michael D. advs. Joyce M. LaFrance*, Docket No. 05-037 (Professional Conduct Committee, June 21, 2007). In October 2008, Mr. Hatem received a Warning that he must more carefully attend to the details of operating a law firm. *See Hatem, Michael D. and Donovan, Patrick E. advs. Attorney Discipline Office # 06-041*. A mitigating factor in this case is the absence of a dishonest motive. Mr. Hatem's cooperation with the disciplinary proceeding was positive up through the parties submitting a joint stipulation. Once the Committee rejected the joint stipulation, Mr. Hatem told Disciplinary Counsel he wanted a hearing. Subsequently, Mr. Hatem refused to claim the Notice of Charges Disciplinary Counsel sent to him by certified mail, even though Disciplinary Counsel told him she was sending them to him. Disciplinary Counsel then extended Mr. Hatem the courtesy of in-hand service of the Notice of Charges by the Hillsborough County Sheriff. Mr. Hatem never answered the Notice of Charges. Disciplinary Counsel then requested that a hearing panel be appointed for the purpose of determining sanction. On January 28, 2011, three days after the Hearings Committee Administrative Coordinator assembled a panel and sent notice of the sanction hearing, Mr. Hatem sent the following email to Disciplinary Counsel:

Dear Counsel,

I waive any hearing. I am currently teaching and I do not want to miss a school day to discuss this matter further. I will file a written response that will cover my argument. This case is a microcosm of why I am no longer practicing law and why most lawyers hate the practice.

Sincerely,

Michael D. Hatem

Given Mr. Hatem's lack of cooperation after the Committee rejected his stipulation, any cooperation Mr. Hatem did evidence at the beginning of the process should not be considered as

a mitigating factor. However, given the lack of any substantial harm to his client, his lack of a selfish or dishonest motive and the Hearing Panel's failure to find that the violations were done knowingly, the Committee hereby imposes a Public Censure.

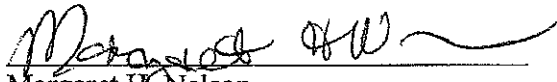
IV. COSTS

The Professional Conduct Committee hereby assesses Mr. Hatem all costs associated with the investigation and prosecution of this matter. *See* N.H. Sup. Ct. R. 37(19).

V. 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).

May 23, 2011


Margaret H. Nelson
Chair

Distribution:
Jennifer B. Sargent, Disciplinary Counsel
Michael D. Hatem, Esquire
James Dunphy, President and CEO, Hampshire First Bank
File