

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Simensen, Erik J. advs. Kenny W. and Patricia L. Roberts # 10-038

REPRIMAND

On December 13, 2011, the Professional Conduct Committee deliberated the above captioned matter. Members present included Margaret H. Nelson, Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, James R. Martin, Jaye L. Rancourt, and Richard D. Sager. David N. Cole and Benette Pizzimenti were not present.

The Professional Conduct Committee (“PCC”) considered and granted the parties’ Assented-To Motion to Permit Waiver of the Hearings Committee Process. Upon further deliberation, including consideration of the Respondent’s and the Attorney Discipline Office’s (“ADO’s”) Stipulation as to the Facts, Violations, and Recommended Sanction (“Stipulation”), the PCC makes the following factual findings and rulings.

I. FINDINGS OF FACT

The Committee accepts the Stipulation. This establishes the following facts by clear and convincing evidence:

1. Erik J. Simensen is an attorney licensed to practice law in New Hampshire. Mr. Simensen was admitted to practice on May 24, 2004.
2. At all times material to this proceeding, Mr. Simensen worked for Dargon Law Firm, PLLC at 101 North State Street, Suite 301, Concord, New Hampshire 03301.

3. Mr. Simensen was a salaried employee of the firm, working with clients seeking loan modifications, debt settlements, and traditional legal matters as needed.
4. Dargon Law Firm P.L.L.C. was created in New Hampshire on November 14, 2008. Its primary office was located in Concord, New Hampshire.
5. Attorney Daniel P. Dargon was the registered agent and principal of Dargon Law Firm.
6. Dargon Law Firm's Certificate of Formation filed with the New Hampshire Secretary of State describes its primary business purpose as "attorney services to the public."
7. On July 6, 2010, the ADO received a letter (dated June 1, 2010) written by Kenny and Patricia Roberts of Newton, North Carolina.
8. The Robertses had called the Dargon Law Firm ("Dargon") after viewing a TV commercial advertising Dargon's mortgage loan modification services.
9. In a fax to the Robertses dated March 11, 2010, Dargon Case Consultant Amber Meissner stated that "[an] attorney...is your best hope to get the maximum amount of reductions you are entitled to," and detailed what steps the client must take before Dargon could move forward on a loan modification application.
10. A Dargon Law Firm Client Flat Fee Agreement ("Agreement") for law related services accompanied the March 11, 2010, fax to the Robertses.
11. On March 12, 2010, the Robertses signed the Agreement, indicating that they were seeking "negotiation of a loan modification on [their] residential real property."
12. The fee stated in the Agreement was \$2,500.00, to be paid in five equal installments. The first \$500.00 was to be tendered along with the signed Agreement.
13. Dargon Law Firm confirmed receipt of the initial \$500.00 installment payment.
14. The Agreement also stated that "Dargon Law is only licensed to practice law in certain states, and may retain and make use of outside affiliate attorneys licensed in Client's jurisdiction...."
15. The Robertses also completed a Client Authorization for Credit Report and Attorney Services. The authorization "grants the Dargon Law Firm PLLC and any of its representatives authorization to discuss, negotiate, and accept or reject negotiations for all aspects of the below client's (loans and debts)."
16. The Client Information form completed by the Robertses clearly indicated their residency in North Carolina.

17. On March 15, 2010, Dargon Law Firm sent a letter to the Robertses stating:

This confirms that you have become a client of the Dargon Law Firm, PLLC. Your file has been opened and assigned to Attorney Erik Simensen to commence the loan modification process.

The letter is signed by "Erik J. Simensen, Esq., Dargon Law Firm, PLLC."

18. Mr. Simensen's letter also included a list of documents the Robertses would need to assemble and forward to the Dargon office.

19. In response, the Robertses provided a Monthly Loan Statement they received from their mortgage lender, Vanderbilt Mortgage and Finance, Inc. ("Vanderbilt") of Maryville, Tennessee.

20. The Robertses also completed and returned a Hardship Affidavit Form. The form states:

I/We am/are submitting this form to my/our Attorney and indicating by my/our checkmarks ("✓") the one or more events that contribute to my/our difficulty making payments on our/my mortgage loan. Attorney will use this form to draft a Hardship Letter.

21. On April 15, 2010, Mr. Simensen prepared and faxed a loan modification request package to Vanderbilt. The fax was on Dargon Law Firm letterhead and was signed by "Erik J. Simensen, Esq., Dargon Law Firm, PLLC."

22. After signing the Client Fee Agreement, Mr. Roberts called the Dargon office a number of times, speaking with Mr. Simensen on at least three occasions. Mr. Simensen also placed calls to Mr. Roberts.

23. The following day, Mr. Simensen called Vanderbilt and spoke to Mike Tidwell. Mr. Tidwell informed Mr. Simensen that the mortgage loan was secured by a manufactured home, and that those types of loans were structured differently. Vanderbilt could only offer the Robertses an extension of the repayment period.

24. This extension of the term for repayment of the loan offered by Vanderbilt would amount to a savings of approximately \$30.00 per year for the Robertses.

25. Mr. Simensen then asked Mr. Tidwell to take a closer look at the request and suggest another possible option for the Robertses. Mr. Tidwell agreed to give the matter a second look and asked Mr. Simensen to call back in approximately two weeks.

26. On April 17, 2010, Mr. Simensen left for what he thought would be a brief vacation. While vacationing, he received word from Dargon that he was being placed on temporary furlough. There was no guarantee that he would be recalled to work.
27. The Robertses' file was taken over by Attorney Joseph Russell.
28. Mr. Roberts only spoke with Mr. Russell on one occasion.
29. The Robertses had paid \$1,500.00 to Dargon before being told that a "modification" of their mortgage loan would yield, at best, minimal savings. No loan modification was ever completed.
30. The Dargon Law Firm ceased operations on or about September 1, 2010.

Interview with the Attorney Discipline Office

31. On November 15, 2010, Mr. Simensen came to the ADO for an interview.
32. According to Mr. Simensen, case assignments to attorneys at Dargon Law Firm were determined by "the office." The firm employed sales associates to screen and engage the clients, and the lawyers handled the loan modification applications after the Client Flat Fee Agreement with the firm was executed.
33. Regarding out-of-state loan modification clients, Mr. Simensen relied on assurances of other lawyers that what he was doing was permissible conduct and that he could handle any cases assigned to him.
34. Regarding the Robertses' file, Mr. Simensen confirmed that he sent the loan modification package to Vanderbilt the day he had received all of the documentation he needed.
35. Mr. Simensen acknowledged having contacted Vanderbilt on the Robertses' behalf and requesting that Mr. Tidwell reconsider the initial assessment by Vanderbilt that the Robertses' loan was not likely to be meaningfully modified.
36. Mr. Simensen planned to follow up with Vanderbilt when he returned to the office, but without any advance notice he was laid off and did not return to Dargon Law Firm after his vacation.

Stipulation ¶¶ 1-36 at 1-6.

II. RULINGS OF LAW

The PCC accepts the Stipulation and accordingly finds clear and convincing evidence that the Respondent violated the following Rules of Professional Conduct.

Rule 5.5(a): Unauthorized Practice of Law

37. Under N.H.R. Prof. Conduct 5.5 (a), a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession of that jurisdiction.
38. Under the broadest of definitions “[The] practice of law includes all actions taken for a client in matters connected with the law.” 7 C.J.S. § 26.
39. In Kamasinski v. McLaughlin, N.H. Super. Merr. Co. 2001-E-0386, (Jan. 30, 2003) the New Hampshire Superior Court (Fitzgerald, J.) stated that, for the purposes of that case, the practice of law included but was not limited to “negotiation of legal rights or responsibilities on behalf of another entity or person(s).” *Id.* (citing N.H. HB 1420, Chapter 218:1, Laws of 2002, Task Force on the Definition of the Practice of Law).
40. In this case, Mr. Simensen held himself out as an attorney to the clients and their lender, and then took the initial steps necessary to negotiate a modification of the clients’ mortgage loan.
41. Mr. Simensen is not admitted to practice law in North Carolina nor any state other than New Hampshire.
42. Mr. Simensen engaged in the unauthorized practice of law by representing the Robertses, who lived in North Carolina, in loan modification negotiations with a Tennessee bank. As the attorney assigned to the Robertses’ case, Mr. Simensen determined what documents were needed to apply for the loan modification, prepared and submitted a loan modification package to the bank, and actively represented the legal interests of the Robertses with respect to their application.
43. Mr. Simensen’s conduct with respect to his communications with the Robertses and third parties, and his negotiation of the terms of the Robertses’ residential mortgage loan, represents clear and convincing evidence of a violation of N.H. R. Prof. Conduct 5.5 (a).

Rule 8.4(a): General Rule

Because the above rule violation is proven by clear and convincing evidence, this constitutes a violation of N.H. R. Prof. Conduct 8.4(a).

Stipulation ¶¶ 38-45 at 6-7.

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., Conner’s Case*, 158

N.H. 299, 303 (2009). *The American Bar Association's Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*") provide guidance when establishing an appropriate sanction for the Unauthorized Practice of Law. Although the Court has not adopted the *Standards*, it looks to them for guidance. *Id.* at 303. The *Standards* set forth a four part analysis for courts to consider in imposing sanctions for any act of attorney misconduct: "(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's Case*, 155 N.H. 613, 621 (2007)); *Standards* §3.0. The first three steps create the framework for characterizing the misconduct and determining a baseline sanction. *See Conner's Case* at 303. ("In applying these factors, the first step is to categorize the respondent's misconduct and identify the appropriate sanction.")

Under the first prong of the analysis, Mr. Simensen's misconduct violated his duty as a professional when he engaged in the unauthorized practice of law. *Standards*, II - Theoretical Framework.

The second prong of the three-part test requires analysis of Mr. Simensen's mental state. The facts of this case support the conclusion that Mr. Simensen acted knowingly with respect to the loan modification work that he was doing, and he knew he presented himself as an attorney to the Robertses and their lender. However, he was negligent in failing to determine that what he was doing constituted the unauthorized practice of law.

The third prong requires analysis of the injury caused by Mr. Simensen's misconduct. Clearly, Mr. Simensen caused injury to the reputation and integrity of the legal profession by engaging in the unauthorized practice of law. The following sections of the *Standards* are relevant to determining the appropriate baseline sanction in the instant case:

7.0: *Violations of Other duties Owed as a Professional*

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public or the legal system.
- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.
- 7.3 [Public Censure] is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.
- 7.4 [Reprimand] is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as professional and causes little or no actual or potential injury to a client, the public or the legal system.

The duty violated, the accompanying mental state, and harm caused by the misconduct here warrant a baseline sanction of Public Censure. Once the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.* (“After determining the sanction, [the Court] considers the effect of any aggravating or mitigating factors on the ultimate sanction.” *Wolterbeek's Case*, 152 N.H. 710 at 714 (2005)). There are a number of mitigating factors in this case, namely Mr. Simensen’s absence of a prior disciplinary record, absence of a selfish or dishonest motive, and inexperience in the practice of law. *Standards* §9.3. Throughout the investigation and resolution of this matter, Mr. Simensen has been cooperative and forthcoming, and he has accepted responsibility for his misconduct. In addition to the mitigating factors articulated under the *Standards*, the parties agree that the business enterprise here was formed by an attorney other than Mr. Simensen. Mr. Simensen was employed by the Dargon Law Firm for a short period of time, and initially joined the firm after experiencing a prolonged period of unemployment. Mr. Simensen followed the practices and procedures established by Dargon Law Firm prior to his employment. Mr. Simensen attempted to obtain a loan modification for the

Robertses. When he was told that the modification would not be substantial, he requested the lender look at more options. Before the final determination on the Robertses' case was made, Mr. Simensen was no longer employed by Dargon and, therefore, he had no ability to request that the firm refund the fees they had paid. The parties agree that this missed opportunity to provide restitution to the Robertses is not solely the responsibility of Mr. Simensen.

Aggravating factors include the vulnerability of the victims and Mr. Simensen's lack of awareness of the impropriety of his conduct, coupled with his lack of initiative in determining the ethical implications of his actions. Mr. Simensen relied on assurances of other lawyers in the firm that what he was doing was permissible conduct. *Standards* §9.2.

Stipulation ¶¶ 46-60 at 8-11.

Although the baseline sanction here was Public Censure, the Committee was particularly cognizant of the mitigating factors involved: the absence of a prior disciplinary record; the absence of a selfish or dishonest motive; and Mr. Simensen's inexperience in the practices of law. Furthermore, the Committee notes that Mr. Simensen had been employed by the Dargon Law Firm for only a short period of time, had experienced a prolonged period of unemployment at the time of his hire, and was following the law firm's practices established prior to his employment. The Committee believes, therefore, that the facts in this case, combined with a balancing of aggravating and mitigating factors, warrant a sanction of Reprimand, and that such a sanction meet the purposes of attorney discipline in New Hampshire.

IV. SANCTION

For all of the above reasons, the Committee hereby issues a Reprimand.


V. COSTS

The parties have stipulated and the Committee accepts the Stipulation in that Mr. Simensen shall pay all costs associated with the investigation and prosecution of this matter.

VI. CONCLUSION

For the above reasons, the Committee issues a Reprimand to Erik J. Simensen for violating N.H. R. Prof. Conduct 5.5(a): Unauthorized Practice of Law, and 8.4(a): Misconduct.

January 23, 2012


Margaret H. Nelson
Chair

Distribution:

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