

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
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Witkus, Lanea A. advs. Richard Maville # 09-049
and
Witkus, Lanea A. advs. Hugh M. Tamoney # 06-029

PUBLIC CENSURE AND EXTENSION OF STAYED SUSPENSION

On October 18, 2011, the Professional Conduct Committee heard Oral Argument and deliberated the above captioned matters. The entire record was also reviewed, including letters from Richard Maville dated September 3, 2011, and October 18, 2011, and a letter from Hugh M. Tamoney dated September 7, 2011. Members present included: Benette Pizzimenti, Vice Chair and Chair of this matter, Toni M. Gray, Vice Chair, Susan R. Chollet, David N. Cole, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, James R. Martin, Jaye L. Rancourt, and Richard D. Sager. Margaret H. Nelson, Chair, was recused. Thomas P. Connair was recused and also absent. Julie A. Introcaso, Disciplinary Counsel, represented the Attorney Discipline Office (ADO), John C. Kissinger, Jr., Esquire, represented Lanea A. Witkus, Esquire, who was present. Mindy Maville was also in attendance. Richard Maville submitted a letter to the Committee but did not attend Oral Argument. The Committee voted to grant the Motion to Permit Waiver of the Hearings Committee Process.

I. PROCEDURAL BACKGROUND

Lanea A. Witkus, Esquire, was issued a six month suspension, with four months stayed, on March 1, 2010, in the matter of *Witkus, Lanea A. advs. Hugh M. Tamoney # 06-029*, hereinafter "*Tamoney case*," for violations of N.H. Rules of Professional Conduct 3.3(a)(1): Candor to the Tribunal; 3.4(d): Fairness to Opposing Party and Counsel, and 8.4(a): Misconduct, subject to certain conditions. Those conditions included attending six hours of CLE on office management within the next six months, with in-person attendance. The additional credits were to be in addition to the twelve annual credits required by the N.H. MCLE Board, and were not to be used as carry over credits for the following reporting year. A further condition was that there be no further violations for a period of two years. If a grievance were filed but remained unresolved during the two year period, the stay of the suspension would be extended until such time as the grievance was resolved. Ms. Witkus was also ordered to pay all costs, which have been paid in full.

On September 24, 2009, prior to the imposition of the sanction in the *Tamoney case*, a grievance was filed, and later docketed as *Witkus, Lanea A. advs. Richard Maville # 09-049*, hereinafter "*Maville case*." Since the issuance of the *Tamoney Order*, no new grievances have been filed.

II. FINDINGS OF FACT

The parties have stipulated, and the Committee accepts the Stipulation as to the facts in the *Maville case*. The facts are as follows:

1. Lanea A. Witkus ("the Respondent") has been a member of the New Hampshire Bar since 1977. At all times material to this proceeding, the Respondent operated her law office as Witkus Law Office, PLLC, 14 Ash Street, Newport, New Hampshire.

2. On September 24, 2009, Richard Maville filed a grievance with the ADO, claiming that Ms. Witkus had violated the New Hampshire Rules of Professional Conduct in connection with her representation of Mindy Maville, Mr. Maville's ex-wife, in a highly contested divorce proceeding lasting over three years ("the Maville case").
3. The divorce proceedings involved heated and protracted disputes over child custody, child support and asset division.
4. The Case Summary of the matter from the Claremont Family Division indicated that the parties and Court made over 400 entries in the case. Many of these entries were motions, filed by both sides.
5. Many of the motions filed sought expedited relief and were filed in *ex parte* form.
6. New Hampshire Family Division Rule 2.9 *Emergency and Ex Parte Relief*, states, in pertinent part:

A. Emergency. If either party believes a hearing is needed prior to participation in mediation, that party shall file a request for an immediate hearing, identifying the emergency and the issues to be addressed at the hearing.

B. Ex Parte....an emergency order may be granted without written or oral notice to the other party or attorney only if it clearly appears to the Court from specific facts shown by sworn statement or by verified petition that immediate or irreparable injury, loss, or damage shall result to the applicant, the children, or the marital estate before the other party or attorney can be heard...

7. On October 26, 2009, Ms. Witkus filed an Ex Parte Motion to Clarify Order of October 21, 2009, on behalf of Ms. Maville.
8. That morning, she emailed a copy of the motion to Mr. Maville (appearing *pro se*) but did not include copies of the attachments she was submitting to the court in support of her motion. Her email to Mr. Maville suggested that she could not comply with the normal

procedures for filing motions because of the emergency nature of her requests.

9. The Motion accurately stated that the pictures and attachments were not provided to Mr. Maville.
10. The prayer for relief requested the following:
 - A. Clarify that the 22 inch LCD panel is not Logan's TV and that Mr. Maville already received the LCD panels.
 - B. Remove the ski boots from the order.
 - C. Clarify that "all tools" does not include the tools he left.
 - D. Clarify whether "all tools" means the tool kit she received from her brother.
 - E. For such other and further relief as may be just.
11. In response to the Motion, the Court (Luneau, MM.) issued an Order dated October 27, 2009. In the Order, the Court observed that "[there] is no emergency apparent," and admonished both parties stating:

The Court is concerned that in this case, the Ex Parte procedure has not been used for its proper purpose, which is to address emergencies. In the future, no action will be taken on Ex Parte requests which do not conform to Family Division Rule 2.9...
12. The court also noted that "delivery of Ex Parte pleadings has been an issue for both parties" and that "the Court may wait to issue a ruling until it has proof of delivery of all Ex Parte pleadings and attachments to the other party."
13. Ms. Witkus acknowledges becoming embroiled in the litigation of the *Maville* case to a point where she did not exercise good professional judgment.
14. As a result of Ms. Witkus' undetached zealotry in representing her client, she filed some motions, exemplified by the October 26, 2009, Ex Parte Motion to Clarify,

suggesting a more pending urgency and harm than may have been present.

Stipulation As To Facts, Rule Violations, and Sanction, pp. 1-4.

III. RULINGS OF LAW

The parties have stipulated, and the Committee accepts the Stipulation as to the N.H. Rules of Professional Conduct that were violated. The Stipulation establishes the following violations by clear and convincing evidence:

Rule 3.4(c): Fairness to Opposing Party and Counsel

15. Rule 3.4(c) states that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal.
16. Ms. Witkus owed Mr. Maville and his counsel the duty to obey the rules of the tribunal; specifically, New Hampshire Family Court Rule 2.9. *See also* New Hampshire R.S.A. 458:16 and 461-A:9.
17. Ms. Witkus breached her duty to obey the rules of the tribunal when she filed an *ex parte* motion when there were no emergency circumstances that would result in irreparable harm or injury to her client, the children or the marital estate.
18. Ms. Witkus' knowing failure to comply with a court order or rule constitutes a violation of N.H. R. Prof. Conduct 3.4(c).

Rule 8.4(a): General Rule

19. Because there is clear and convincing evidence that Ms. Witkus violated Rule 3.4(c), there is necessarily clear and convincing evidence of a violation of Rule 8.4(a).

Stipulation As To Facts, Rule Violations, and Sanction pp. 4-5.

IV. ANALYSIS

The purpose of the Court's disciplinary process 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). Any sanction should take into account the severity of the misconduct. *See Coffey’s Case*, 152 N.H. 503, 513 (2005). Although the Supreme Court has not adopted the *ABA Standards for Imposing Lawyer Sanctions* (“*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. *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, Ms. Witkus violated the duty to the legal system. As an officer of the court, Ms. Witkus must always operate within the bounds of the law.

Under the second prong of the analysis, the Committee, in reviewing the totality of the circumstances, finds that Ms. Witkus’s mental state was one of negligence.

Under the third prong of the analysis, Ms. Witkus’s conduct caused unnecessary litigation and was an abuse of the legal process. The Court admonished both parties, stating:

The Court is concerned that in this case, the Ex Parte procedure has not been used for its proper purpose, which is to address emergencies. In the future, no action will be taken on Ex Parte requests which do not conform to Family Division Rule 2.9...

The Committee finds that ABA *Standard* 6.23: Reprimand¹ is most appropriate under the circumstances of this case.

Under the fourth prong of the analysis, the Committee agrees with the parties that the aggravating factors are a prior discipline history, and substantial experience in the practice of law. Mitigating factors include the absence of a dishonest or selfish motive, full and free disclosure to Disciplinary Counsel, a cooperative attitude toward these proceedings, remorse, acceptance of responsibility for the misconduct, and the extension of other penalties in the *Tamoney* case.

The Committee considered all of the relevant aggravating and mitigating factors, and found they did not warrant a departure from the baseline sanction under the circumstances.

V. SANCTION

For all the reasons stated above, the Committee hereby imposes a Public Censure.

In addition, the Committee extends the stayed the stayed suspension in the *Tamoney* case through December 31, 2013, with a further provision that the mentorship requirements be extended through the period stated above. The mentorship shall be provided by attorney Jessica Hodgman or other qualified mentor approved by Disciplinary Counsel. The monthly mentorship meetings shall continue through the entire stayed suspension. Any future grievance filed against the Respondent during the period of the stayed suspension shall be processed by the ADO on an expedited basis and Disciplinary Counsel shall be alerted. The ADO shall notify the Committee as to the existence of any docketed complaint, and the Committee shall schedule a hearing for

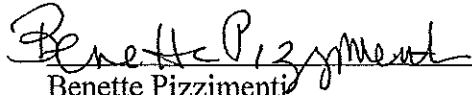
¹ The most analogous sanction in New Hampshire is a Public Censure. Disciplinary Counsel's Assented to Motion to Permit Waiver of Hearings Committee Process inadvertently states that Standard 6.21 corresponds to a Reprimand.

Ms. Witkus to show cause why the suspension should not be imposed. All other portions of the Agreement to Extend not specifically modified by this Order shall remain in full force and effect.

VI. COSTS

The Committee adopts the parties Stipulation that the Respondent shall pay all costs of the investigation and prosecution of this matter.

November 9, 2011


Benette Pizzimenti
Vice Chair

Distribution:

Julie A. Introcaso, Disciplinary Counsel
John C. Kissinger, Jr., Esquire
File

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

Witkus, Lanea A.advs.Richard Maville#09-049

MOTION TO RECONSIDER AND TO CLARIFY

Now comes Lanea A. Witkus and moves and states as follows:

1. The committee varied it's order from the one stipulated to, and in it's analysis stated that the mitigating and aggravating factors essentially evened themselves out and therefore the sanction was the baseline sanction for this matter.
2. The committee has used the ABA standards for Attorney Discipline to reach it's conclusion. At paragraph the top of page 7 of it's Order dated November 9, 2011, the committee finds that a censure is the appropriate remedy, and in a foot note explains the difference between reprimand in the ABA standards and a reprimand in New Hampshire.
3. The committee's decision is unclear in light of the stipulations. It is unclear to this attorney whether the interplay of stipulated facts and the process and practices of the Attorney Discipline system in the state protects all parties' rights under the due process clause of both state and federal constitutions. This counsel believes the committee was not changing the stipulated facts but simply erred in it's application of the factors in this case.
4. In the Waiver of Hearings Committee Process the stipulation as to facts by the DC, attorney, and her attorney, stated as is quoted below:

28. In determining a baseline sanction here, the Standards offer material guidance. Section 6.2, Abuse of the Legal Process, suggests:

6.21 that Reprimand' is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.22 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

29. The Parties agree that Ms. Witkus' misconduct is most closely associated with a negligent act that causes little or no actual or potential injury, warranting a baseline sanction of reprimand.

5. The committee took the word reprimand in paragraph 29 to mean a reprimand under the ABA standards which does correspond to a censure in this state,
6. However, paragraph 29 from the Waiver document noted above uses the factors that are set out in 6.22 of standards of the ABA which is called an Admonition, i.e. negligence and little or no actual or potential injury.

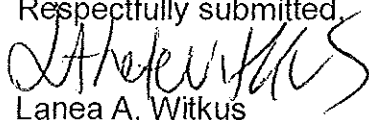
7. As the committee noted, an admonition is designated a reprimand in New Hampshire. That is the proper sanction given the facts in this case. The Stipulation at Paragraph 29 referred correctly to a New Hampshire reprimand.
8. The fact that there was little or no injury is stipulated to. The matter of the proper sanction for a technical rules violation is particularly important for other attorneys who review the matter.
9. It is noted in the preface to the ABA standards that there is a problem with a lack of reporting as to violations of standards. In general, people are less likely to report a possible violation of the rules if the effect of such a report will be out of proportion to the result.
10. A private reprimand is the most appropriate sanction in the case of a technical rules violation with little or no actual injury.
11. The judge did admonish both parties, but she also clarified the order. In this case as can be seen by the multitude of motions, if the matter were not addressed in the ex-parte, it would be brought up in an inevitable contempt motion.
12. The matter here is the proper or improper use of the legal process. In the matter of an ex-parte motion the judge has the ability to simply deny it, schedule it for hearing at a later time, or in appropriate cases the court itself can and does issue sanctions.
13. There is no hidden action and the motion's appropriateness can be dealt with immediately. The ABA standards refer to the vulnerability of the victim when

measuring injury. In this case the court has many weapons to protect itself, or the opposing party.

14. This motion is directed only to the change of a New Hampshire Reprimand for a New Hampshire Censure. It is noted that the committee extended the mentoring and the Tamony suspension for an additional year in excess of the stipulated year. This motion does not address that change as this counsel believes that the best use of the attorney discipline process is to be proactive and address matters in a practical manner. I am an advocate for peer review and this is essentially mandatory peer review.

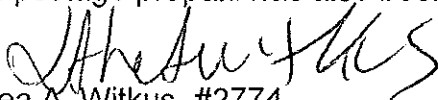
Wherefore Attorney Witkus respectfully requests that committee clarify and or reconsider it's decision and find that under these circumstances a New Hampshire Reprimand is the appropriate remedy, not censure.

Respectfully submitted,


Lanea A. Witkus

CERTIFICATION

I, Lanea A. Witkus, certify that a copy aforesaid "Motion to Reconsider and Clarify" is being delivered on this ^{7th} day of November 2011, to Julie A. Introcaso, Disiplinary Counsel, 4 Chenell Drive, Suite 102, Concord, New Hampshire 03301 and by regular mail postage prepaid has also been sent to Richard Maville.


Lanea A. Witkus, #2774
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New Hampshire Supreme Court
Professional Conduct Committee

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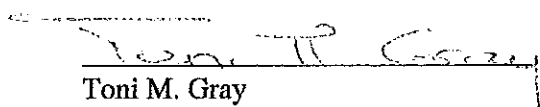
Witkus, Lanea A. advs. Hugh M. Tamoney # 06-029

ORDER ON RECONSIDERATION

On December 13, 2011, the Professional Conduct Committee deliberated Respondent's Motion to Reconsider and to Clarify filed on November 18, 2011, and Mr. Maville's letter dated November 25, 2011. Members present included Toni M. Gray, Vice Chair and Chair of this matter, Susan R. Chollet, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Gerald A. Daley, Richard H. Darling, James R. Martin, Jaye L. Rancourt, and Richard D. Sager. Benette Pizzimenti, Vice Chair, was absent. Margaret H. Nelson, Chair and Thomas P. Connair were recused.

In light of the fact that Respondent's request cited no points of law or fact that were overlooked or misapprehended, and due to Ms. Witkus' prior disciplinary record, the Motion to Reconsider is denied.

January 4, 2012



Toni M. Gray
Vice Chair

Distribution:

Lanea A. Witkus, Esquire
Richard Maville
Hugh M. Tamoney
File

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

<http://www.courts.state.nh.us>

RULE 7 NOTICE OF DISCRETIONARY APPEAL

This form should be used only for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court in (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; or (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A, except that an appeal from a final divorce decree or from a decree of legal separation should be filed on a Rule 7 Notice of Mandatory Appeal form.

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

Witkus, Lanea A. advs. Richard Maville case# 09-049

Witkus, Lanea A. advs. Hugh Tamoney case# 06-029

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Professional Conduct Committee

3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

Lanea A. Witkus

Post Office Box 5

Newport, New Hampshire 03773

603-863-5287

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Case Name: _____

RULE 7 NOTICE OF DISCRETIONARY APPEAL

<p>4A. NAME AND ADDRESS OF OPPOSING PARTY</p> <p>Richard Mavile Post Office Box 1921 New London, New Hampshire 03257</p> <p>Hugh Tamoney 18598 Lakeside Garden Dr. Jupiter, Florida 33458</p>	<p>4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL</p> <p>Julie A. Introcaso Disciplinary Counsel 4 Chenell Drive Suite #102 Concord, New Hampshire 03301 603-224-5828</p>
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5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING.

November 9, 2011

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY.

January 4, 2012

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. APPELLATE DEFENDER REQUESTED? YES NO

IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? YES NO

IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

Case Name: _____

RULE 7 NOTICE OF DISCRETIONARY APPEAL

10. IF ANY PARTY IS A CORPORATION LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? YES NO

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?

YES NO

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

RULE 7 NOTICE OF DISCRETIONARY APPEAL

13. NATURE OF CASE AND RESULT (Limit two pages double-spaced; please attach.)

14. ISSUES ON APPEAL (Limit eight pages double-spaced; please attach.)

The New Hampshire Supreme Court reviews each discretionary notice of appeal and decides whether to accept the case, or some issues in the case, for appellate review. The following acceptance criteria, while neither controlling nor fully describing the court's discretion, indicate the character of the reasons that will be considered.

1. The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.
2. The decision below conflicts with a statute or with prior decisions of this court.
3. The decision below is erroneous, illegal, unreasonable or was an unsustainable exercise of discretion.

Separately number each issue you are appealing and for each issue: (a) state the issue; (b) explain why the acceptance criteria listed above support acceptance of that issue; and (c) if a ground for appeal is legal sufficiency of evidence include a succinct statement of why the evidence is alleged to be insufficient as a matter of law.

15. ATTACHMENTS

Attach to this notice of appeal the following documents in order: (1) a copy of the trial court decision or order from which you are appealing; (2) the clerk's notice of the decision below; (3) any court order deciding a timely post-trial motion; and (4) the clerk's notice of any order deciding a timely post-trial motion.

Do not attach any other documents to this notice of appeal. Any other documents you wish to submit must be included in a separately bound Appendix, which must have a table of contents on the cover and consecutively numbered pages.

16. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading. *OR all plain error & covered by SC rule 10-A*

[Signature]

Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

2-3-2012
Date

[Signature]

Appealing Party or Counsel

RULE 7 NOTICE OF DISCRETIONARY APPEAL

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. A paper copy of the transcript will be prepared for the court. Parties will be provided with an electronic copy of the transcript in PDF format.

DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	PORTIONS PREVIOUSLY PREPARED	DEPOSIT (SEE SCHEDULE BELOW)
October 18, 2011	Oral argument	Less than 1 hr	n/a PCC	None	\$175
					\$
					\$
					\$
					\$
					\$
DO NOT SEND DEPOSIT AT THIS TIME					TOTAL DEPOSIT: \$

SCHEDULE OF DEPOSITS

<u>Length of Proceeding</u>	<u>Deposit Amount</u>
Hearing or trial of one hour or less	\$ 175
Hearing or trial up to ½ day	\$ 450
Hearing or trial of more than ½ day	\$ 900/day

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

Nature of the case

This matter arises as a result of a Professional Conduct Complaint filed by Mr. Maville. The complaint was forwarded to the Disciplinary Counsel, who investigated and found the complaint to be unsubstantiated. The DC had the case under review for months, in part due to changes in staff, and then filed and the appellant agreed to a technical rules violation with a mentoring component in the prior Tamoney case, to be in effect for one year beyond the current probationary period, and a private reprimand in the Maville case. The documents in the appendix were filed with the PCC which requested an oral argument. That occurred on October 18, 2011. They made an order that deviated from the agreed upon sanction, extending the probationary period in Tamoney and changing the private reprimand to a Public Censure. The appellant filed a motion to reconsider based on the misinterpretation of the ABA Standards for Imposing Lawyer Sanctions, which the Committee had misapplied given the agreed upon facts, and providing further facts as to the issue of harm. The Committee *denied* the reconsideration and stated it considered a letter from both Mr. Tamoney and Mr. Maville.

The appellant has begun the mentoring component of the decision, and intends to continue with it pending this appeal if it is granted, and has no objection to that sanction, either as a part of the action, or as an amendment to the existing Tamoney case. Appellant disagrees with the extension of time for the Tamoney case to remain open, and disagrees with the change of a Private Reprimand to a Public Censure. She believes a Public Censure is harmful to the bar and the public in this situation.

Rule 37 16 (g) provides for a discretionary appeal.

Appeal questions

Question one: Whether the PCC made an error of law and incorrectly interpreted the *ABA Standards for Imposing Lawyer Sanctions*, hereafter Standards, when it ordered a Public Censure; as the Standards set out the following analysis: 1.the nature of the violation, 2. mental state, 3. the potential or actual injury and 4.aggravating and mitigating factors, when applied to the following stipulated facts in this case: 1. was a technical violation of a court procedural rule of failing to use good judgment an ex-parte was filed the situation was not sufficiently urgent. 2. a negligent mental state, 3. little or no harm actual or potential harm and 4. aggravating and mitigating factors were found to have canceled each other out, the Standards direct a Private Reprimand (using the terms with their New Hampshire meanings)

Criteria for Discretionary Appeal: This case is one of first impression, as best this appellant can ascertain, and an issue of broad public interest. The PCC stated that it arrived at that conclusion without looking at mitigating and aggravating factors which canceled each other out. That means that any lawyer is susceptible to a Public Censure if they request an ex-parte order and that order is denied. If this discipline is reported publicly it will result in more complaints to the PCC since anyone against whom a ex-parte motion was not granted will feel they have been wronged, whether or not that is the case. After the Tamoney case was reported publicly an opposing pro se party raised the issue of conflict that was so egregious that the appellant objected, as the appellant rarely does. He told the Superior Court he didn't really think there was a conflict; he just wanted to delay the hearing. He received no consequences. When this type of discipline is publicized it does not increase the public's faith in the system and it

or the other participants in the court system. People who are knowledgeable about these cases (for various reasons there are many such people), have lost respect for the court system. The public does not distinguish between the various entities. When they see the severe sanction the appellant received from the PCC for negligence and the lack of consequences for a false pleading by the complainant, the disparate treatment makes the entire judicial system in New Hampshire look foolish.

Question three Whether as a matter of public policy PCC erred in finding professional misconduct when the action complained of is fully known to the court, which in this case was the filing of an ex-parte motion, because this type of rule violation should be handled by the court as:

A) to have the PCC second guess the Court undermines the public's confidence in the judicial system and constitutes an unwarranted intrusion in to the ability of trial court which is in the best position to decide how to address the matter if there is a problem.

B) it violates the equal protection clause of the state and federal constitutions if attorneys are subjected to a separate and additional sanction thereby creating an unacceptable disadvantage to clients of attorneys who, with an abundance of caution, may advise against potentially meritorious claims, when a pro se litigant, who acted in the same or more abusive manner is not subject to such consequences.

Criteria for Discretionary Appeal: The language quoted by the PCC in it's order left out the fact listed in the Stipulation that the Master directed the admonition to both sides. This was noted in the Motion to Reconsider. There is no analogous process in the current court system to protect the rights of the opposing litigants and attorneys from even the most outrageous behavior of pro se litigants.

Much of the policy considerations noted in the previous question apply here. The appellant read the "Report on the Status of the Bar 2007" because it was on this court's web site. The "Minority report status of the bar 2007" pointed out the disconnect between the bar and the court. One of the reasons cited was that the PCC system is punitive rather than rehabilitative. The report stated "I believe that Judges in general have forgotten that their natural constituency is the Bar - we lawyers; and I believe that judges have turned their countenances away from lawyers and towards the general public in a way has helped to create the disconnect." I hope that is not so. The Supreme Court has to consider the public's interest; that is right and proper. The bar also is attuned to the needs of the public, who we represent as they are our living as well as our calling. The public who come in contact with the system, represented and unrepresented are outraged by the extent that the court allows pro se litigants to abuse the system. So are attorneys.

The Disciplinary Counsel, hereafter DC, had information about the credibility of Mr. Maville that the PCC was not informed of. The Court in the Maville matter has issued orders as follows: He was not credible when he testified that Ms. Maville was not letting him speak to the children when the phone records showed the phone calls occurred. he made a face at me during the final hearing (noted in the final decree), he has been found in contempt for cashing in stocks and a 401-K in violation of the orders against hypothecating, (final decree) and recently in contempt for hiding the fact he operated LLC with undisclosed bank accounts for two years.

The PCC refers to Mr. Mavilles's letter and Mr. Tamoney's letter as being considered in their decision. There are serious credibility questions relating to both

gentlemen. There is no place in the process to bring the credibility to the PCC. See next question.

Question four Do the procedural rules under which the PCC operates, violate the state and federal constitutional protections to the extent that the PCC, which has no factual evidence to go on, has the ability, and in practice has often, refused to accept a dismissal of a complaint when such dismissal is recommended by the DC, such that the DC cannot act as an independent prosecutor and this process places the PCC in the role of the DC's client in making the ultimate client controlled decision: whether or not to bring a case: and Appellant has been personally affected by the bias of this process as the several Disciplinary counsel's investigations did not substantiate any of the complainants' allegations, yet the several DC's did not then dismiss the case as they could not exercise their good independent judgment but had to find some violation, leading to this technical rules violation which it is unlikely would ever had been brought but for the prior cases and the predisposition of the PCC to view the appellant in a negative light.

Criteria for Discretionary Appeal: In the present action, the appellant agreed to a mentoring arrangement under the Tamoney case and a Private Reprimand under the Maville case for a variety of reasons, one being to "buy peace," another being a belief that the mentoring arrangement is the way the PCC should be reacting to attorney errors. The procedural rules make it impossible to settle a case. The PCC rejected the stipulated findings in the Tamoney case, a hearings panel then found that the facts the DC and the appellant agreed to were correct. However, after forcing the appellant to defend herself at a hearing, they found she was too defensive and increased the

sanction. This appellant never wanted to fight with the PCC. The PCC seems to make factual determinations when it has no trustworthy evidence to go on.

The cases that discuss the need to keep the prosecutorial and adjudicatory functions separate require that there be a specific finding of bias which affected the appellant. Mr. Maville's allegations were not substantiated. That was made clear at the oral argument. So having no case before it the DC, (and this case was open during a transitional period so there were several parties reviewing it), the DC came up with a case, a technical rules violation.

Question five Whether the PCC erred as a matter of law by findings a violation of Rule 3.4C with a negligent mental state when the 3.4 c says "A lawyer shall not: (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists";

Criteria for Discretionary Appeal See Supreme Court Rule 16 A.

Question six Did the PCC commit a plain error of law by confusing the role of the Attorney with that of the client in that an Attorney under rule 1.2 (a) is not allowed to substitute their judgment for that of a court, and are obligated to file pleadings as long as they are not clearly frivolous, In this instance the PCC decision was based on a factor, specifically "the attorney filed some motions exemplified by the October 26, 2009 Ex-Parte Motion to Clarify, suggesting more pending urgency than may have been present" whereas the urgency and harm are questions of substance not procedure and as such is under the control of the client under PCC rule 1, 2 (A).

Criteria for Discretionary Appeal: The attorney has a duty to bring a motion if it is not frivolous as the Attorney is an advocate and it is improper for the Attorney to

substitute their opinion for that of the Court. The ABA comments specifically state that “Conversely, lawyers usually defer to the client regarding such questions as to the expense to be incurred, and the concern for third persons who might be adversely affected.” The Ethic’s committee’s comments to that section state. “A lawyer must always carefully consider all client requests or decisions, in light of all relevant factors, including but not limited to, the particular fact pattern, type of representation, a client’s social and economic considerations, and the scope of representation and earlier decisions reached during the representation.”

The facts noted in the stipulation showed that there had been prior ex-parte pleadings brought by both sides. Prior orders had been granted or denied without comment. The reconsideration informed the PCC, correctly, that in the same order that the Master admonished both sides about ex-parte orders, the relief sought was addressed by the court. In this unusual case, any lack of clarity in court orders caused additional motions, and having the court address these issues saved court time overall. It is the party and not the attorney who is sanctioned if a violation occurs. The public does have problems differentiating attorneys from clients, but the PCC should know the difference.

Question seven Whether the PCC made a plain error of law by finding professional misconduct where the finding was that the appellant “failed to exercise good professional judgment”, as an error in judgment is not grounds for professional misconduct.

Criteria for Discretionary Appeal : Same as question ~~seven~~ *FIVE*.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. LD-2012-0003, Appeal of Lanea A. Witkus, the court on March 7, 2012, issued the following order:

Appeal from the Professional Conduct Committee is declined. See Rule 10(1).

Under Supreme Court Rules 10 and 37(16), the supreme court has discretion to decline an appeal from the Professional Conduct Committee. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who reviewed this case believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Dalianis, C.J., and Hicks, Conboy and Lynn, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

Professional Conduct Committee, 06-029, 09-049

Lanea A. Witkus, Esq.

Julie A. Introcaso, Esq.

File

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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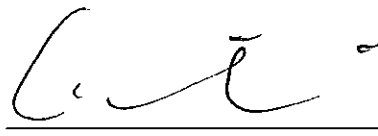
Witkus, Lanea A. advs. Hugh M. Tamoney # 06-029
and
Witkus, Lanea A. advs. Richard Maville # 09-049

EXTENSION OF STAYED SUSPENSION

On December 10, 2013, the Professional Conduct Committee deliberated Disciplinary Counsel's Assented-to Motion to Extend the Stay. Members present included David M. Rothstein, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Alan J. Cronheim, Richard H. Darling, Elaine Holden, Heather E. Krans, and Martha Van Oot. Thomas P. Connair was recused and not present. Richard D. Sager and Mary Elizabeth Tenn were absent.

Attorney Witkus is presently under the conditions of a stayed suspension which is set to expire on December 31, 2013. There is a new matter currently under investigation that will require more time to process than the current December 31, 2013 expiration of the stay. Upon consideration, the Committee voted to extend the stayed suspension until such time as the new matter (*Witkus, Lanea A. advs. ADO # 13-024*) is resolved. All conditions currently in place shall continue during this extension.

December 11, 2013



David M. Rothstein, Chair

Distribution:

Sara S. Greene, Disciplinary Counsel
Lanea A. Witkus, Esquire
File

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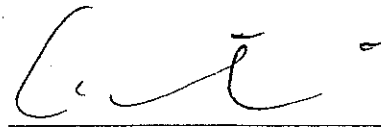
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December 11, 2013



David M. Rothstein, Chair

Distribution:

Sara S. Greene, Disciplinary Counsel
Lanea A. Witkus, Esquire
File