

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
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Holly B. Fazzino, Administrator

To: James L. Kruse, Assistant Disciplinary Counsel
Andrew S. Winters, Esquire

From: Holly B. Fazzino, Administrator

Date: January 10, 2013

RE: *Brouillard, Philip A. advs. Attorney Discipline Office # 10-053*

Enclosed is the Reissued Recommendation of a Two Year Suspension in the above referenced matter, as discussed earlier today.

File

Holly Fazzino

From: Holly Fazzino
Sent: Thursday, January 10, 2013 9:31 AM
To: Jim Kruse
Cc: andrew@cohenwinters.com
Subject: RE: Brouillard

I will arrange to reissue the Order with the correction.
Thank you.

Holly B. Fazzino, MLSP
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New Hampshire Supreme Court
Professional Conduct Committee
4 Chenell Drive, Suite 102
Concord, NH 03301
(603) 224-5828 Fax (603) 228-9511

From: Jim Kruse
Sent: Thursday, January 10, 2013 9:27 AM
To: Holly Fazzino
Cc: andrew@cohenwinters.com
Subject: Brouillard

Holly: We are about to file a Petition with the Supreme Court to approve the PCC's suspension order and I expect you will be sending up the record. In the course of preparing the Petition, I noticed a typographical error in the Committee's "Recommendation of a Two Year Suspension" (PCC 22). At the end of the section on Sanction at page 13, the order refers to a suspension "based on his violations of Rules 3.3, 8.4(c), and 8.1(a)." I expect the reference to Rule 8.1(a) was meant to be Rule 8.4(a), and, for purposes of the Petition, I have assumed that the Committee intended to refer to Rule 8.4(a). Rule 8.1(a) would pertain to Mr. Brouillard's cooperation with ADO. He was not charged with a violation in that regard.

Jim

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Brouillard, Philip A. advs. Attorney Discipline Office # 10-053

**REISSUED RECOMMENDATION OF A TWO YEAR SUSPENSION
TO CORRECT LISTING OF VIOLATIONS IN SANCTION SECTION**

The Professional Conduct Committee (“Committee”) held Oral Argument and deliberated this matter on October 16, 2012. The following members of the PCC were present: Margaret H. Nelson, Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, David N. Cole, Thomas P. Connair, Alan J. Cronheim, Richard H. Darling, James R. Martin, Richard D. Sager and Lisa Wellman-Ally. Gerald A. Daley was absent. Benette Pizzimenti, Vice Chair was recused and also not present.

Oral Argument was presented by James L. Kruse, Assistant Disciplinary Counsel presented for the Attorney Discipline Office, and Andrew S. Winters, Esquire, for the Respondent. Philip A. Brouillard, Esquire, and Gladys Strickhart, Legal Assistant to Mr. Kruse were also present.

Following Oral Argument, the Committee deliberated the matter and considered the entire record, including the Notice of Charges, Answer, Hearing Panel Reports, transcripts of the hearings, exhibits and memoranda.

I. SUMMARY OF CHARGES AND PROCEDURAL BACKGROUND

Respondent Philip A. Brouillard is a New Hampshire attorney who was admitted to the New Hampshire Bar in 1981. Mr. Brouillard maintains an office at 16 Academy Street, Laconia, where he practices law and engages in real estate investment and management.

This matter came before the Committee following a complaint to the Attorney Discipline Office (“ADO”) by the Clerk of the Belknap Superior Court. The ADO issued a Notice of Charges on January 25, 2012, subsequently amended, alleging that Mr. Brouillard had violated New Hampshire Rules of Professional Conduct 3.3, 4.1(a), 8.4(a), and 8.4(c). These violations were alleged to have occurred in connection with (1) his execution, as trustee of a trust that owned property, of a contract for flood restoration services under the false pretense he had purchased appropriate insurance coverage to cover the cost when he knew he had not done so, and (2) for misrepresenting material facts in subsequent litigation arising out of that contract.

A Hearing Panel held an evidentiary hearing on May 11, 2012. The Panel issued a Preliminary Order dated June 9, followed by a more comprehensive Hearing Panel Report dated July 16, 2012 (the “Report”).

After a subsequent hearing on the issue of sanction, on September 5 the Hearing Panel issued a Recommended Sanction recommending Mr. Brouillard be suspended from the practice of law for two years with the suspension stayed for two years based on certain conditions being met. The ADO recommends that a two year suspension be imposed with no stay. For the following reasons the Committee finds by clear and convincing evidence that Mr. Brouillard violated Rules 3.3, 8.4(c), and 8.4(a), agrees with the ADO’s recommendation, and finds that a petition to the Supreme Court to suspend Mr. Brouillard from the practice of law for two years is appropriate.

The Committee also agrees with the Hearing Panel's conclusion that there is insufficient evidence to find a violation of Rule 4.1(a). The Hearing Panel so found that because Rule 4.1(a) only applies if an attorney is representing a client. Mr. Brouillard was representing the Trust in his own capacity as Trustee.

II. FINDINGS OF FACT

The parties did not stipulate to any facts. Following deliberation the PCC voted to accept the facts found in the Report. Pertinent facts found by the Hearing Panel follow:

Mr. Brouillard is the Trustee of the Quain Trust, which owns a parcel of commercial property in Belmont, New Hampshire, leased by Brookside House of Pizza, Inc. ("Brookside"), whose President is Vasilios Lazos. On January 28, 2009, the property suffered significant water damage as the result of a broken sprinkler pipe. After being advised of the damage Mr. Brouillard contacted Fire Cleanup Services, Inc. ("Fire Cleanup"), to request that it provide fire restoration services.

Under the lease agreement between Brookside and Quain Trust, Mr. Brouillard was contractually obligated as trustee to maintain liability and casualty insurance on the premises. He did not do so. As lessee Brookside was also required to have insurance on its property, which it had. When Mr. Brouillard contacted Fire Cleanup it required that he execute a contract which requested insurance information. Mr. Brouillard provided Fire Cleanup with the information for Brookside's insurance policy, but did not indicate on the contract that the insurance he described was not the property owner's insurance, but was the lessee's insurance. Mr. Brouillard signed the contract on behalf of the Trust as well as on behalf of Brookside by signing Mr. Lazos' name as President of Brookside.

After receiving the contract Fire Cleanup completed the work. When Fire Cleanup presented Mr. Brouillard with a bill for services, Mr. Brouillard informed the firm for the first time he did not have insurance on the property. A claim for coverage was filed under Brookside's insurance policy. The claim was denied. After Mr. Brouillard's continued failure to pay Fire Cleanup's charges, Fire Cleanup filed a lawsuit in Belknap Superior Court against Mr. Brouillard. Mr. Brouillard filed a cross claim against Brookside. The litigation was eventually settled by agreement and Mr. Brouillard paid all damages sought by Fire Cleanup.

III. DISCUSSION

Rule 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 3.3 states in pertinent part that a lawyer "shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . or (3) offer evidence that the lawyer knows to be false." Furthermore, if a lawyer has offered material evidence and comes to know of its falsity, Rule 3.3 requires attorneys to take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

The Hearing Panel found by clear and convincing evidence, and the Committee agrees, that Mr. Brouillard executed a contract with Fire Cleanup Services knowing he did not have insurance coverage while representing he had coverage. He failed to clarify with Fire Cleanup at any time thereafter that he was the sole owner of the property and did not have insurance coverage, but was instead attempting to collect on a tenant's policy, information he also failed to clarify to the court during the subsequent Belknap Superior Court litigation. Therefore, Mr. Brouillard induced Fire Cleanup to provide services under false pretenses by knowingly misrepresenting the availability of

property owner's insurance to pay for services required to restore the property. He then purposely undertook to bind the tenant to the contract with Fire Cleanup to facilitate a claim under the tenant's insurance policy, knowing there was no property owner's insurance coverage for the loss. Mr. Brouillard violated his duty of honesty by making an intentional misrepresentation both to a contracting third party and a court.

In considering Mr. Brouillard's mental state, it is clear that he made the representation to Fire Cleanup to induce the company to provide services without seeking payment in advance from him and with the intent to bind Brookside's insurance company, which should not have been the primary insurer. Although Mr. Brouillard claimed to the Hearing Panel his actions were more a fault of his inaction (failing to notify Fire Cleanup that he did not have insurance, and failing to correct the record with the Court), the Panel rightfully found that "his failure of omission is no less serious than an affirmatively false statement." The Panel also found, and the Committee agrees, that

contrary to Mr. Brouillard's argument, he did operate from a selfish motive. Indeed he was to gain a significant financial advantage if he could get Fire Cleanup to perform the work required, and have Brookside's insurance cover the loss. That result, which is what Mr. Brouillard intended by his misrepresentations, resulted in a significant financial gain to Mr. Brouillard (and to Mr. Lazos) as they were both able to significantly mitigate their losses by ensuring the insurance coverage was available to pay for the damage resulting from the fire.

Hearing Panel Recommended Sanction at 1.

Mr. Brouillard argued to the Panel that no one was harmed by his conduct because he continues to have good relationships with Fire Cleanup and Mr. Lazos. As the Panel found, and the Committee agrees, the injury stemming from the professional misconduct in this circumstance is to the profession rather than to an individual or individuals: Mr. Brouillard's dishonesty and lack

of candor causes damage to the public's confidence in the bar as a whole.

During its hearing on sanction the Hearing Panel heard from a number of witnesses, including Mr. Brouillard's clients Clayton Dunn and Peter DeJager, and Mr. Brouillard's father and longtime law partner, Richard Brouillard. The Panel also heard evidence on aggravating and mitigating factors, including the following:

Aggravating Factors: Mr. Brouillard's two prior disciplinary actions include a history of being personally involved and blurring boundaries of professional and personal relationships. It seems from these actions that Mr. Brouillard's personal relationship with his business partner, Mr. Lazos, and desire to maintain that relationship may have resulted in his behavior which ultimately benefited both himself and Mr. Lazos.

Mitigating Factors: The Panel considered a number of mitigating factors, including documents and testimony evidencing Mr. Brouillard's long history of public service, including pro bono service to the New Hampshire Bar Association, Mr. Brouillard's good character, including letters from court personnel, and his long time active involvement in the Court's Rule 170 mediation program. In addition, the Panel considered the role Mr. Brouillard's medical condition played in his decisions in this matter. The Panel found it impossible to determine the degree to which his medical condition impacted his behavior except to find that his medical condition did not impact his decision to drop his insurance coverage on the building despite knowing he had a contractual obligation to provide coverage.

Mr. Brouillard asserted to the Panel that the most important mitigating factor in his case is his lack of an unselfish or improper motive. This assertion is belied by the fact that he gained a significant financial result from his behavior, both in having Fire Cleanup perform services without

payment for several months, as well as ultimately securing insurance coverage from Mr. Lazos' insurance company.

With respect to the Rule 3.3 charge, the Hearing Panel found, and the Committee affirms, clear and convincing evidence of a violation. Mr. Brouillard filed a cross claim in a civil action initiated by Fire Cleanup against Quain Trust and Brookside to obtain payment for services rendered at the property in which he stated that Vasilios Lazos, owner and President of Brookside, made the initial call to obtain services from Fire Cleanup. This was a representation of material fact that Mr. Brouillard knew was false

The Hearing Panel also found that Mr. Brouillard presented an executed contract for services to Fire Cleanup that purportedly contained the binding signature of Mr. Lazos on behalf of Brookside, knowing that Mr. Lazos had not signed the contract. Further, Mr. Brouillard presented this contract to Fire Cleanup, including information regarding insurance, causing Fire Cleanup to believe that the Trust had insurance when Mr. Brouillard knew the Trust had no insurance. These misrepresentations are relevant to the issue of sanction.

IV. SANCTION ANALYSIS

Case law in New Hampshire and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*") support the conclusion that Mr. Brouillard should be sanctioned with a suspension. The purpose of the New Hampshire Supreme 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. After 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. *See Conner's Case*, 158 N.H. at 303.

Under the first prong of the analysis, Mr. Brouillard breached his duty of candor and honesty by making misrepresentations of material fact and undertaking to deceive Fire Cleanup as to the availability of property owner insurance to pay for requested services. Mr. Brouillard also twice made a material misrepresentation of fact to the Court relative to the involvement of Brookside in contracting for such services.

The second prong of the test requires analysis of Mr. Brouillard’s mental state. Mr. Brouillard’s violation of Rule 8.4(c) involved a knowing and intentional state of mind. Mr. Brouillard knew that he was misrepresenting the availability of property owner’s insurance, and he did so in order (1) to induce Fire Cleanup Services to provide services under false pretenses, and (2) to set up a claim under Brookside’s tenant’s insurance policy based on the false premise that Brookside was a party to the services contract. Although the Hearing Panel did not find that Mr. Brouillard forged Mr. Lazos’s signature on the contract because it lacked clear and convincing evidence Mr. Brouillard was not authorized to sign Mr. Lazo’s name, the Panel found that Mr.

Brouillard presented the fully executed contract to Fire Cleanup knowing that Mr. Lazos had not signed it.

Mr. Brouillard's violation of Rule 3.3 involved Mr. Brouillard's knowing misrepresentation of material fact in a cross claim filed in Fire Cleanup's suit to recover payment on the contract, with the likely purpose to support his position that Mr. Lazos authorized the Fire Cleanup contract and to avoid liability under the contract. Mr. Brouillard repeated the misrepresentation in a subsequent Declaratory Judgment action initiated by him on behalf of the Trust seeking coverage under Brookside's insurance policy. Mr. Brouillard's violations seriously and adversely reflect on his honesty and, therefore, his fitness to practice law.

Under the third prong of the analysis, Mr. Brouillard caused actual harm to Fire Cleanup. Fire Cleanup proceeded with work on the job without its usual security for payment and was then required to litigate its claim for payment. Mr. Brouillard's actions also caused actual or potential harm to the reputation of lawyers and the integrity of the legal profession.

The *Standards* offer guidance in determining a baseline sanction as follows:

Section 5.1: Failure to Maintain Personal Integrity

5.11 Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

- 5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.
- 5.13 Reprimand¹ is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.
- 5.14 Admonition² is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Section 6.1: False Statements, Fraud, and Misrepresentation

- 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 Reprimand 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 proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.
- 6.14 Admonition 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 or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

¹ Section 5.13 and Section 6.13 use the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

² Section 5.14 and Section 6.14 use the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

Under the circumstances presented in this case, the appropriate baseline sanction is disbarment or suspension. *Standards* §§ 5.11(b) and 6.12. This baseline sanction is considered in light of the aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303. A mitigating factor is Mr. Brouillard's cooperative attitude in the disciplinary process, combined with his expression of remorse and acceptance of responsibility for his misconduct. The weight accorded this mitigating factor, however, is reduced by the Hearing Panel's finding that Mr. Brouillard's testimony regarding the circumstances under which he signed the contract was not "particularly credible."

Aggravating factors include Mr. Brouillard's extensive experience in the practice of law, his selfish or dishonest motivation, and his record of prior disciplinary infractions. Mr. Brouillard was reprimanded in December 2004 for violations of Rules 1.4 and 1.3, to which he had stipulated. (*Brouillard, Philip A. advs. S. Jonathan Lowe - #00-N-149*) Mr. Brouillard failed to file suit on behalf of his client as promised and repeatedly failed to communicate with his client about the legal and practical aspects of the case. The Committee found that Mr. Brouillard appeared genuinely remorseful for the course of conduct and earnestly apologized for his failures. In March 2011 the Committee approved Mr. Brouillard's stipulation to misconduct and issued a public censure. (*Brouillard, Philip A. advs. John J. Moynihan - #10-003*) Mr. Brouillard violated Rules 1.1, 2.1, and 1.7 in connection with his participation as counsel for his girlfriend in her divorce proceeding. Mr. Brouillard counseled his client to communicate with her minor son about issues in the case contrary to the court's order and agreed to file pleadings that were procedurally defective,

redundant, meritless, and sometimes vexatious. The Committee found that Mr. Brouillard exhibited a pattern of negligence and that he engaged in an egregious conflict of interest.³

The New Hampshire Supreme Court's decision in *Bosse's Case*, 155 N.H. 128 (2007), is instructive. Mr. Bosse, a New Hampshire attorney who was acting in his capacity as a real estate agent, notified landowners in Hillsboro, New Hampshire, that he had builders ready to purchase their land. Following contact from a landowner interested in selling his property, Mr. Bosse communicated with one of the builders. Believing that the seller would agree (which he did not), Mr. Bosse prepared and signed the seller's name to a purchase and sale agreement and listing agreement for a house to be built on the property without the seller's consent or authorization, then uploaded the listing to the Northern New England Real Estate Network (Network). Mr. Bosse represented falsely to the Network's administrator that the purchase and sale agreement was "in effect."

The Court sustained the Committee's finding that Mr. Bosse acted intentionally and deliberately in undertaking to deceive the Network administrator and that the baseline sanction was disbarment. *Standards* § 5.11. Although there was substantial harm to the integrity of the legal profession, the Court found no actual harm to the Network or to the seller who was not compelled to sell his property. The Court found mitigation in Mr. Bosse's lack of prior discipline; his cooperation, expression of remorse, and admissions of misconduct; and the imposition of other penalties (loss of Mr. Bosse's real estate license). Aggravating factors included Mr. Bosse's substantial experience in the practice of law and his selfish or dishonest

³ The Committee is mindful that the sanction in this matter was issued following the facts of the instant matter. Given the close proximity of these events and the similarity of issues, the Committee deemed it relevant. However, absent consideration of Mr. Brouillard's public censure, the record fully supports the Committee's Order.

motive. The Court distinguished the *Bosse* case from other disbarment cases in part by finding that Mr. Bosse had engaged in an isolated incident rather than a pattern or prolonged course of misconduct. It rejected the Committee's recommendation of disbarment and suspended Mr. Bosse for two years. *See also Grew's Case*, 156 N.H. 361 (2007).

The present case involves similar aggravating and mitigating factors. It is distinguishable from *Bosse* insofar as Fire Cleanup suffered discernible harm by having to perform on the contract without its usual security and having to litigate its claim for payment, Mr. Brouillard has not been subject to other penalties, his misconduct is not fairly characterized as an "isolated incident," and he has a disciplinary record.

In light of the above circumstances, Mr. Brouillard's sanction should be comparable to the discipline imposed by the New Hampshire Supreme Court in *Bosse* and *Grew*. Accordingly, considering the four-part analysis recommended by the *Standards*, New Hampshire case law, and the purposes of attorney discipline in New Hampshire, the Committee finds that it is appropriate to petition the New Hampshire Supreme Court to suspend Mr. Brouillard for two years.

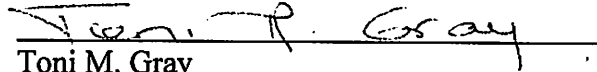
V. SANCTION

For the above reasons, the Committee voted to recommend that Mr. Brouillard be suspended from the practice of law based on his violations of Rules 3.3, 8.4(c), and 8.4(a)

VI. CONCLUSION

The Committee hereby directs Assistant Disciplinary Counsel to file a Petition with the New Hampshire Supreme Court for a two year suspension. The Committee voted to assess all costs associated with the investigation and prosecution of this matter, with payment in full prior to reinstatement.

January 10, 2013


Toni M. Gray
Vice Chair

Distribution:

James L. Kruse, Assistant Disciplinary Counsel
Andrew S. Winters, Esquire
File