

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Clauson, K. William advs. Attorney Discipline Office # 09-038

ORDER ON SIX MONTH SUSPENSION

On December 11, 2012, the Professional Conduct Committee (the "PCC"), issued an order suspending K. William Clauson for a period of six months. Mr. Clauson appealed the order to the New Hampshire Supreme Court. The Court declined the appeal on June 27, 2013. *See In the Matter of K. William Clauson*, LD-2013-0005. Having reviewed the Supreme Court order, the Committee imposes the six month suspension consistent with Supreme Court Rules 37(13)(a-e) and 37(14) on the following terms and conditions:

The sanction is based on a finding of a violation of Rules 1.7(a)(2) and Rule 8.4(a).

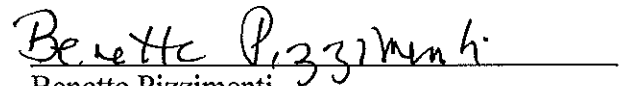
This order shall take effect on August 9, 2013, or if Mr. Clauson files a Motion for Reconsideration at such time that the Supreme Court issues a ruling on the Motion, whichever is later. ("effective date"). In connection with the suspension Mr. Clauson shall take the following actions:

- a. Mr. Clauson shall cease all practice of law on or before the effective date. Mr. Clauson shall not take on any new matters for new or existing clients. Supreme Court Rule 37(13)(c).
- b. Mr. Clauson shall comply with all the provisions of Supreme Court Rule 37(13)(a) and (b). He shall notify all clients and opposing counsel in writing of his suspension and inability to act as an attorney after the effective date of the suspension. Mr. Clauson shall apprise his clients of their need to obtain other legal counsel, instruct them regarding the handling and transfer of their files and make available to all

clients the original file contents and other property to which they are entitled, calling attention to any urgency for obtaining the files or property.

- c. Mr. Clauson shall file with the Court an affidavit pursuant to Supreme Court Rule 37(13)(d) within thirty (30) days after the effective date of the suspension order, and he shall serve the PCC with a copy of the affidavit.
- d. Mr. Clauson shall keep all records of the various steps taken in compliance with this order and he shall retain all documents as required as required in Rule 37(13)(e).
- e. Mr. Clauson shall comply with NH Rule Prof. Conduct 7.5. Any and all advertising, including but not limited to signage, letterhead, and website shall not include his name during the period of suspension.
- g. Mr. Clauson shall pay all costs associated with the investigation and prosecution of this matter prior to reinstatement.
- h. Provided that Mr. Clauson has timely complied with each of the above requirements, and satisfactorily completed the Multistate Professional Responsibility Examination, Mr. Clauson may apply for reinstatement following six months of the effective date, pursuant to Supreme Court Rule 37(14)(f) without further hearing before this Committee.

July 9, 2013


Benette Pizzimenti

Distribution:

James L. Kruse, Deputy General Counsel
K. William Clauson
File

New Hampshire Supreme Court
Professional Conduct Committee

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LD-2011-010 Clauson's Case
Clauson, K. William advs. Attorney Discipline Office # 09-038

SIX MONTH SUSPENSION ON REMAND

On December 11, 2012, the Professional Conduct Committee ("Committee") heard oral argument on sanction in the above referenced matter. Members present included Benette Pizzimenti, Vice Chair and Chair for this matter, Toni M. Gray, Vice Chair, Thomas P. Connair, Alan J. Cronheim, Richard H. Darling, Elaine Holden, James R. Martin, Richard D. Sager, and Lisa Wellman-Ally. Susan R. Chollet was recused and abstained from the vote. Members recused and not present were Margaret H. Nelson, Chair, and David N. Cole.

James L. Kruse, Assistant Disciplinary Counsel appeared for the Attorney Discipline Office ("ADO"), and K. William Clauson, appeared *pro se*.

The matter came before the Committee on remand from Mr. Clauson's appeal of the order of the Committee suspending him from the practice of law for six months based on findings that he violated New Hampshire Rules of Professional Conduct 1.1, 1.7(a), 1.9(a), and 8.4(a). The Court affirmed in part, reversed in part, vacated in part, and remanded. The Court found that Mr. Clauson violated only Rules 1.7(a)(2) and 8.4(a) by clear and convincing evidence and remanded the matter for reconsideration of the appropriate sanction. *See, Clauson's Case*, 164 N.H. 173 (2012).

Following oral argument, the Committee deliberated this matter. The Committee considered the entire record, the decision of the New Hampshire Supreme Court and each party's memorandum on sanction. The Committee recognizes the extent of the rules violations has changed since its prior decision. The Supreme Court found only one substantive violation involving a conflict of interest. However, the Committee voted to impose the same sanction of a six month suspension. We have focused on protecting the public and preventing similar conduct in the future.

PROCEDURAL BACKGROUND

The Supreme Court decision provides the underlying facts of the case. We briefly summarize the facts to give the background for the sanction analysis. A concurrent conflict of interest arose when Mr. Clauson undertook to represent both Brenda Gray, the alleged victim in a domestic simple assault case, and her husband, Todd Gray, the defendant, in the same case. At a bail hearing before Judge Albert J. Cirone, Jr., in the Lebanon District Court, Mr. Clauson represented both Grays on the request that a no-contact bail condition be lifted. Mr. Gray was also arraigned and entered a not guilty plea through his counsel, Mr. Clauson. Judge Cirone expressed his concerns as follows: "Well, does anybody else here besides me see a potential conflict between counsel for the defendant and counsel for the victim being the same person?" Record Tab 16, Transcript of Bail Modification Hearing 6/30/09, p.11, at 11-13.

This was the first red flag that Mr. Clauson chose to ignore. Rather than withdraw from the case, Mr. Clauson turned a deaf ear to the Court's concerns. He failed to recognize that a "potential" for a conflict, as articulated by Judge Cirone, is embodied in Rule 1.7(a)(2) which requires an attorney to consider whether there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client..."

When the case came before the Committee for reconsideration of the appropriate sanction, Mr. Clauson did not focus on the sanction but argued that his practice and reputation had already suffered. He asked the Committee to reduce his sanction to "that already imposed to date."¹ Despite the decision of the New Hampshire Supreme Court that he violated Rule 1.7(a)(2), it was not until the conclusion of his presentation that Mr. Clauson belatedly recognized that his representation of Mr. and Mrs. Gray presented a significant risk that his representation of one of them would be materially limited by his responsibilities to the other. Although he finally acknowledged that he violated Rule 1.7(a)(2), he justified his conduct by stating that justice and truth were served, and that no actual harm occurred in the end.²

Assistant Disciplinary Counsel recommends that the Committee not alter its sanction order based on the Supreme Court's decision. He emphasizes Mr. Clauson's prior disciplinary history, including a public censure in 2007 for similar misconduct. It is his position that the prior sanctions did not effectively deter Mr. Clauson's repeated misconduct or serve to moderate Mr. Clauson's approach to the issue. The ADO noted that Mr. Clauson had taken the Multi-state Professional Responsibility Exam ("MPRE") and passed with flying colors³. However, there are no assurances that requiring him to retake the MPRE and imposing another public censure would alter Mr. Clauson's approach, understanding and attitude toward conflicts. The ADO concludes that in the absence of any track record of improvement since the last round of disciplinary proceedings, we are exactly where the Committee left off before it went to the Supreme Court, with a suspension as the appropriate sanction.

¹ Clauson's Memorandum as to Sanctions, 12/7/12, p. 1.

² Transcript of Oral Argument on Sanctions, 12/11/12, p. 30. (hereinafter referred to as "Tr. 12/11/12")

³ Clauson, K. William advs. Attorney Discipline Office # 03-099, Reissued Public Censure with Conditions.

SANCTION ANALYSIS

The Supreme Court limited its holdings to violations to Rule 1.7(a)(2) Concurrent Conflict of Interest and 8.4(a) Misconduct, by clear and convincing evidence. There were no findings made on Rule 1.1 and 1.9(a). Based on the conclusion that there were only two violations, the Supreme Court was not confident that the sanction would have been the same, had the Committee recognized the extent of the violations. The Supreme Court has asked the Committee to reconsider the appropriate sanction in light of its findings.

When determining the sanction, the Court will focus not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future. The Court will “consider the case on its own facts and circumstances in deciding the sanction.” *Morse’s Case*, 160 N.H. 538 (2010). The sanction must take into account the severity of the misconduct. *Coffey’s Case*, 152 N.H. 503, 513 (2005).

The Supreme Court will look to the *American Bar Association’s Standards for Imposing Lawyer Sanctions* (2005) (“*Standards*”) for guidance, although the Court has not formally adopted them. *Conner’s Case*, 158 N.H. 299, 303 (2009). The Standards set forth a four part analysis for courts to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 155 N.H. 613, 621 (2007)); *Standards* § 3.0. Once the baseline sanction is determined, the Court then looks to the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.*

Although the number of charges has been reduced, the most serious charge remains a concurrent conflict of interest charge under Rule 1.7 (a), which provides in pertinent part as follows:

Rule 1.7. Conflicts of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a **concurrent conflict of interest**. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) **there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client , a former client or a third person or by a personal interest of the lawyer. (Emphasis added).**

Mr. Clauson argued that although there was a finding of a conflict in this case, involving the alleged assault on Mrs. Gray, the finding was reversed by the New Hampshire Supreme Court and that there was no conflict. Mr. Clauson failed to recognize that direct adverseness is not

required in order to violate Rule 1.7(a)(2).

Comment 8 to the ABA Model Rules explains amplifies the duty Mr. Clauson owed to his clients:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.... The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client.

We now proceed to the analysis using the *Standards* as guidelines. Under the first prong of the analysis, Mr. Clauson breached his duty of loyalty to his clients. He deprived his clients of candid and independent advice and placed each at risk of harm due to his conflicted loyalties. The Supreme Court recognized that the circumstances of this case show "the primary risk arising from a concurrent conflict of interest under Rule 1.7(a)(2): divided loyalties that might inhibit the lawyer's range of options in advising a client. Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." *Clauson's Case* 164 N.H. 183, 189 (2012).

As to the second prong of mental state element, the risk of a conflict should have been evident to Mr. Clauson, especially in the context of a domestic violence assault case. He exhibited an indifference to the risks associated with representing both the defendant and the alleged victim even after the Court expressed a concern about a risk of a conflict at the bail/arraignment hearing in the Lebanon District Court. We have concluded that Mr. Clauson knew or should have known of the conflict. *Wyatt's Case*, 159 N.H. 285, 306. (2009). His disinclination to evaluate or even consider the risks critical to an assessment of his client's interests and his rejection of the Court's admonition about the apparent conflict evinced a knowing violation as contemplated under the *Standards*.

The third prong of the analysis addresses the injury or potential injury associated with the misconduct. Injury is defined as harm to a client, the public or the profession from a lawyer's misconduct. Potential injury involves the same harm that is reasonably foreseeable at the time of the misconduct which would probably result from the lawyer's misconduct. The potential for harm should have been palpable to Mr. Clauson in the highly charged circumstances involved in domestic disputes.

Mr. Clauson's conduct in violation of Rule 1.7 represents a breach of the "bedrock duty of the legal profession." *Wyatt's Case*, 159 N.H. 285, 306 (2009). Mr. Clauson deprived his clients of candid advice and placed each at risk of harm due to his conflicted loyalties. For

example, Mr. Clauson, who claimed that Mrs. Gray was his client “throughout” the District Court proceeding and that his “primary loyalty in the case” was to her, warned Mrs. Gray in advance of meeting with the prosecutor that “anything you say... can be used against Todd at trial.” Unless he was inclined to compromise Mr. Gray’s defense in order to protect Mrs. Gray’s interests, Mr. Clauson’s further efforts on behalf of Mr. Gray were likely to involve cross-examining Mrs. Gray as a witness for the State. In doing so, Mr. Clauson would run the risk of using privileged information and exposing Mrs. Gray to charges relating to her prior statements to the police.

Mr. Clauson argues that the ends justify the means. He claims that when you review the entire situation from the beginning through its conclusion, justice and truth were served. “Yes, I did something wrong, but nobody was hurt by that, and I was honest about it.” Tr. p. 30, l. 12 – 16. Thus he overlooks not only the potential injury to his clients’ but injury to the legal profession when a lawyer ignores a conflict issue even after a judge draws his attention to the issue.

We have determined that the applicable Standard is § 4.3 as set forth below:

Standard § 4.3, entitled “Failure to Avoid Conflicts of Interest,” provides, in pertinent part, as follows:

- 4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):
- (a) engages in representation of a client knowing that the lawyer’s interests are adverse to the client’s with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.
- 4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
- 4.33 Reprimand [public censure] is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer’s own interests, or whether the representation will adversely affect another client, and

causes injury or potential injury to a client.

- 4:34 Admonition [reprimand] is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

Mr. Clauson's initial failure to recognize the potential conflict of interest associated with representing both Mr. and Mrs. Gray may have been the product of negligence. If merely negligent throughout his involvement, *Standards* § 4.33 would contemplate a baseline sanction of public censure. Mr. Clauson's disinclination to make a critical assessment of his clients' respective interests and potential risks associated with concurrent representation as well as his rejection of the Court's admonition about the apparent conflict, evinced a knowing violation, as contemplated under *Standard*, § 4.32. *Wyatt's Case*, 159 N.H. 285, 306 (2009). However, there is no difference in the outcome in this case whether 4.32 or 4.33 is applied as the baseline when we consider the aggravating factors, especially Mr. Clauson's prior record.

The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g.*, *Conner's Case*, 158 N.H. at 303. There are no mitigating factors in this case, unless the Committee considered Mr. Clauson's misguided agreement to serve as the "cheaper alternative to other counsel" for either Mr. or Mrs. Gray as reflecting the absence of a dishonest or selfish motive. *See Standard* § 9.32.

Aggravating factors include Mr. Clauson's prior disciplinary record, a pattern of misconduct, substantial experience in the practice of law and his refusal to acknowledge the wrongful nature of his conduct. *See Standard* § 9.22.

Mr. Clauson's refusal to acknowledge errors in this case is reflected in his efforts to minimize his involvement as counsel. Mr. Clauson asserts that his initial involvement in the case was limited to resolving the bail condition issue, that he was then engaged only to conduct discovery, and that he did not undertake to represent Mr. Gray in defending the pending criminal charges until after obtaining the discovery. Mr. Clauson's actions, pleadings, court appearances, correspondence to the State, and response to the referral support no such limitations in the scope of Mr. Clauson's representation or ethical responsibilities. Moreover, the actual or potential conflicts existed at all stages of Mr. Clauson's involvement. Mr. Clauson persisted in his denial of a conflict and attributed Judge Cirone's concern in this regard to alleged personal bias. He insisted there was no conflict because he acted in good faith and claimed he had to read the Court's decision five or six times before he understood that "the risk" of a potential conflict was an issue.⁴

⁴ Tr. 12/11/12, p. 22, l. 15-18.

The record is summarized as follows:

- Reprimand in 1981 for use of persons to perform duties on behalf of a client that were unauthorized or contrary to law, in violation of Canon 7 and DR 7-102 (illegal conduct or conduct contrary to disciplinary rule). *Clauson, K. William advs. Joseph Cicotte #793198.*
- Reprimand in 1987 for deceit, misrepresentation, and threatening a complainant in violation of Rule 8.4(c). *Clauson, K. William advs. Robert Summer #863641.*
- Reprimand in 1996 for representing parties under a conflict of interest in violation of Rule 1.9(a). *Clauson, K. William advs. Ronald Sears #94-010.*
- Warning in 2005 to exercise care in accurately characterizing evidence in support of his position. *Clauson, K. William advs. PCC and Richard Balagur #02-092.*
- Public Censure with conditions in 2007 for violating Rule 1.9(a). *Clauson, K. William advs. Attorney Discipline Office #03-099.* Mr. Clauson was required to take and pass the Multi-state Professional Responsibility Exam ("MPRE"), a condition he promptly satisfied.

Mr. Clauson's approach to the conflict issue in the 2007 case are relevant to the sanction analysis in this matter. A detailed outline of the evidence is included in the Professional Conduct Committee's Reissued Public Censure with Conditions, dated October 29, 2007. Mr. Clauson represented a doctor in a contractual dispute with a medical practice in Lebanon, N.H. Mr. Clauson formerly represented the practice in establishing the contractual relationship with the doctor. Mr. Clauson and his firm remained involved as counsel to the medical practice for approximately 15 years. When he agreed to represent the doctor in his dispute with the practice, Mr. Clauson did not research his records to determine if there was a conflict of interest. Significantly, when the issue of conflict was raised by the practice's new counsel, Mr. Clauson took the position that he did not recall ever representing the practice. Mr. Clauson continued in pursuit of the doctor's claims against his former client for several months until disqualified by the Superior Court.

Mr. Clauson's case is substantially different from *Shillen's Case* where the Court found that an attorney's misconduct involving a violation of Rule 1.7(a) warranted a Public Censure. *Shillen's Case*, 149 N.H. 132, 140 (2003). After finding the rules violation, the Court reviewed the aggravating and mitigating factors. The Court found that it was clear "that given the respondent's years of experience practicing law, he should have recognized the conflict of interest and potential consequences to his client, there is no evidence that he acted with a dishonest or selfish motive, he has no prior disciplinary record, and there is substantial evidence in the record of his good character and reputation." Unlike Mr. Shillen, Mr. Clauson has a significant prior disciplinary record spanning three decades, and has exhibited a persistent pattern

of misconduct. Prior sanctions have not effectively deterred his repeated misconduct and protected the public.

These aggravating factors, combined with the baseline sanction, make clear that suspension is the appropriate sanction. Our focus has not been on punishing Mr. Clauson, but on protecting the public and maintaining public confidence in the bar.

Our decision on remand is based on an analysis as set forth above with input from Committee members, both lawyers and non-lawyer members. The following exchange occurred at Oral Argument and exemplifies our concerns:

MR. DARLING: Did the fact that the judge raised his eyebrows and brought up the question of the conflict not cause your heart to beat a little faster and question whether you were really doing the right thing or not?

MR. CLAUSON: No. I mean, when the judge raised his eyebrows, Judge Cirone indicated that he would like to ask questions himself...

MR. DARLING: That's not my question. My question is, the judge obviously was concerned about the fact that you were representing two sides of the same issue.


MR. CLAUSON: No. There's two things. One, I wasn't representing two sides of the same issue.

CONCLUSION

Upon reconsideration of the sanction based on the finding of a 1.7(a)(2) violation and 8.4 (a) the Committee imposes a six month suspension. Mr. Clauson's suspension shall be effective May 1, 2013. Mr. Clauson shall comply with the provisions of the provision of N.H. Supreme Court Rule 37(13)(a-e). In accordance with Rule 37(14)(f), Mr. Clauson may file a Motion for Reinstatement with the Court after November 1, 2013 if he is in compliance with the applicable rule.

Mr. Clauson is assessed all costs associated with the investigation and prosecution of this matter.

February 14, 2013


Benette Pizzimenti
Vice Chair

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. LD-2013-0005, In the Matter of K. William Clauson, the court on June 27, 2013, issued the following order:

Appeal from a decision of 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 a decision of 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.

The motion for summary affirmance is, therefore, moot.

Declined.

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

**Eileen Fox,
Clerk**

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