

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
Susan R. Chollet*
Thomas P. Connair
Alan J. Cronheim
Richard H. Darling

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

Elaine Holden*
Heather E. Krans
Richard D. Sager
Martha Van Oot
Mary Elizabeth Tenn
* non attorney member
Holly B. Fazzino, Administrator

Foley, Richard N. advs. Robin Sawyer # 11-011

SIX MONTH SUSPENSION STAYED FOR ONE YEAR WITH CONDITIONS

On August 20, 2013, the Professional Conduct Committee deliberated the above-captioned matter. The following members were present: 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, Richard D. Sager, Mary Elizabeth Tenn. Martha Van Oot and Thomas P. Connair were absent. The parties submitted an Assented-To Motion to Permit Waiver of Formal Proceedings and for Final Ruling. The Committee voted to grant the Assented-To Motion to Permit Waiver of Formal Proceedings.

The Committee makes factual findings and rulings as detailed below:

I. FINDINGS OF FACT

The Professional Conduct Committee voted to accept the Stipulation as to the Facts, by clear and convincing evidence:

1. Richard N. Foley, Esq., is a New Hampshire attorney who was admitted to the New Hampshire Bar on October 31, 1994. At all times material to this proceeding, Mr. Foley has maintained a law office at 55 Market Street, Portsmouth, New Hampshire.
2. Mr. Foley has also been admitted to practice law in Massachusetts. He was admitted to the Massachusetts Bar on December 13, 1988.

3. Mr. Foley's practice at the time of the events giving rise to this disciplinary matter was almost exclusively devoted to criminal defense matters in which he accepted flat fees. Mr. Foley was not accustomed to billing for his time.
4. The Complainant, Robin Sawyer, filed a complaint with the Attorney Discipline Office (ADO) by letter of October 8, 2010, followed by additional correspondence in October 2010 and in May 2011. Ms. Sawyer claimed that Mr. Foley violated the New Hampshire Rules of Professional Conduct while serving as her counsel in a domestic relations matter pending in Portsmouth Family Division (Case No. 670-2009-DM-00246).
5. At all times relevant to this matter, Mr. Foley had in place an IOLTA client trust account at TD Bank. He also maintained an account at Ocean Bank which appears to be a personal account but has been utilized as a law firm operating account. Mr. Foley also maintained various personal bank accounts, including at least one at Northeast Credit Union (account number ending in 6051), into which he deposited funds relating to Ms. Sawyer's representation.

Robin Sawyer Representation

6. Ms. Sawyer was married to Patrick Sawyer on December 1, 2007. The domestic relations proceeding in Portsmouth Family Division was initiated by Mr. Sawyer on July 6, 2009. A Decree of Divorce was issued on May 21, 2010, following which Ms. Sawyer, through Mr. Foley, filed an appeal with the New Hampshire Supreme Court. The appeal was dismissed on August 12, 2010.
7. Prior to his appearance in the subject domestic relations matter, Mr. Foley defended Ms. Sawyer in June 2009 in an assault charge arising out of a confrontation with Mr. Sawyer.
8. Mr. Foley represented Ms. Sawyer in the criminal assault case on a flat (\$2,500) fee basis. He deposited that fee into his Ocean Bank account.
9. Mr. Foley had no written fee agreement with Ms. Sawyer regarding his representation in the domestic relations matter. Mr. Foley orally agreed to represent Ms. Sawyer for \$200 per hour. He also requested a retainer, payable at such time as the Court authorized the release of joint funds in the marital estate.
10. Ms. Sawyer had very little funds of her own, and other than the initial retainer, any replenishment of the retainer would come from the release of joint funds from the marital estate.

11. Mr. Foley had no discussion with Ms. Sawyer about periodic billing, the amount of retainer required, or how any exhausted retainer would be replenished in connection with the domestic relations matter.
12. Mr. Foley did not keep contemporaneous records of time spent on Ms. Sawyer's matter. At no point during the pendency of the divorce proceedings did Mr. Foley provide Ms. Sawyer with any accounting of his time spent on her matter. Rather, at the conclusion of the representation, in July 2010, he provided her with a good faith reconstruction of time spent on her matter as a final accounting (hereinafter "Summary of Activity").
13. On July 13, 2009, Ms. Sawyer tendered a retainer check made payable to Mr. Foley in the amount of \$2,500. Mr. Foley deposited the check in his operating account at Ocean Bank, but it was returned for "not sufficient funds."¹
14. Ms. Sawyer replaced the returned check with another one in the same amount, dated July 22, 2009, which Mr. Foley successfully cashed through his personal account at Northeast Credit Union.
15. Though his fees were not yet earned, neither check was deposited into Mr. Foley's client trust account.
16. Mr. Foley had no contemporaneous time and billing records associated with his representation of Ms. Sawyer as of the July 22, 2009 payment.
17. According to his Summary of Activity, Mr. Foley had, as of July 22, 2009, earned \$1,560 in fees. Therefore, \$940 was unearned at the time he paid himself the full \$2,500 from Ms. Sawyer's July 22, 2009 check.
18. In its Temporary Decree of September 15, 2009, the Court ordered that all of the Sawyers' jointly held funds as of July 16, 2009, less \$20,000, be placed in an interest-bearing escrow account set up by Mr. Foley at Northeast Credit Union (the "escrow account"). Each party was to receive an equal share of the \$20,000 "to use to maintain themselves pending a further Order of this Court."
19. The escrow account was established by Mr. Foley on September 24, 2009, and all of the parties' funds (\$66,811.18), except \$20,000, were deposited therein.
20. Mr. Foley distributed Mr. Sawyer's \$10,000 share to him, but out of the \$10,000 distribution intended for Ms. Sawyer, Mr. Foley retained \$5,000 for legal fees.

¹ The information regarding specific bank accounts and withdrawals and deposits therefrom is contained in the Audit Report dated December 14, 2012 and prepared by Craig Calaman, CPA. That report is hereby incorporated by reference and attached as Ex. A.

21. Mr. Foley did not deposit the \$5,000 into his client trust account. There is no record of his handling of such funds.
22. Based on Mr. Foley's summary of activity, as of September 24, 2009, he was owed \$580. Because he had earned only this amount at the time he paid himself \$5,000, \$4,420 was unearned, and Mr. Foley remained out of trust with respect to the Sawyer matter until December 8, 2009, when it was fully earned.
23. The Court's Temporary Decree included no reference to use of any portion of the distribution to the parties for legal fees.
24. Mr. Foley recalls that at the time Ms. Sawyer retained him, he informed her that he would replenish his retainer from funds as they were authorized to be released by the Court (e.g., the Court's September 15, 2009 Order authorizing that \$20,000 be split evenly between Mr. and Mrs. Sawyer).
25. Ms. Sawyer does not recall ever being told that Mr. Foley would remove \$5,000 from her \$10,000 distribution as a retainer for fees.
26. Mr. Foley had no time and billing records associated with his representation of Ms. Sawyer as of September 2009.
27. On October 30, 2009, Mr. Foley filed a Motion for Release of Funds on behalf of Ms. Sawyer. Mr. Foley represented to the Court that additional funds were required to defend Ms. Sawyer's interests in the domestic relations case, including an appeal of a restraining order issued earlier in the case. According to Mr. Foley, "[t]he initial retainer provided by Robin Sawyer to the undersigned is exhausted and further funds are necessary to protect her rights both before this Court and the NH Supreme Court."
28. In his Motion for Release of Funds, Mr. Foley requested leave to disburse an additional \$7,500 from the escrow account for his legal fees. Mr. Sawyer, through counsel, objected to the motion. The Court deferred ruling on the motion until the December 8, 2009, pretrial conference.
29. Mr. Foley had no time and billing records associated with his representation of Ms. Sawyer as of October 30, 2009.
30. According to his Summary of Activity, as of October 30, 2009, when he filed the Motion for Release of Funds, Mr. Foley was in possession of an unearned balance of \$2,300, and thus the retainer was not "exhausted" as represented to the Court in his motion.

31. Following a pretrial conference convened on December 8, 2009, and pursuant to a stipulation filed by the parties, the Court authorized, on January 11, 2010, an additional disbursement from the escrow account of \$5,000 to each party.
32. On January 19, 2010, Mr. Foley withdrew the \$10,000 from the escrow account and deposited the entire amount into his client trust (IOLTA) account before disbursing Mr. Sawyer's share on January 27, 2010.²
33. Mr. Foley did not distribute any money to his client. Mr. Foley retained the \$5,000 earmarked for Ms. Sawyer in his client trust account as a fee.
34. Mr. Foley had no time and billing records of his hours and fees as of January 27, 2010 and he did not seek Ms. Sawyer's authorization to retain the \$5,000.
35. As of January 27, 2010, when he retained \$5,000 distributed from the escrow account in his client trust account, Mr. Foley (according to his Summary of Activity) was owed \$3,380, leaving a retainer balance of \$1,620 in his client trust account for Ms. Sawyer.
36. Mr. Foley represented Ms. Sawyer during the domestic relations trial, following which the Court issued its Decree of Legal Separation, dated May 18, 2010, disposing of the financial issues that had been the focus of the parties' litigation. That decree was amended on May 26, 2010, to serve as a Decree of Divorce. During this time the remaining balance of Ms. Sawyer's retainer was exhausted.
37. In a final order issued July 6, 2010, the Court released the balance of the escrow account. The order lists the final balance in the escrow account as \$51,133.90, but in fact the total balance was \$51,175.90, an amount which included \$42 of accrued interest that Mr. Foley neglected to include in his submission to the Court.
38. The Court ordered that \$16,860.88 be disbursed to Patrick Sawyer and \$34,273.02 to Ms. Sawyer.
39. Around July 8, 2010, Mr. Foley transferred \$51,175.90 from the escrow account to his client trust account at TD Bank.

² Mr. Foley actually disbursed \$4,994.00 to Mr. Sawyer. Mr. Foley retained a \$6.00 service charge assessed by the bank for a certified copy of the Court Order authorizing release of funds.

40. On July 10, 2010, Mr. Foley disbursed funds to Mr. Sawyer from the escrow account pursuant to the Court's order. The amount disbursed to Mr. Sawyer was \$16,858.38.³
41. Mr. Foley did not disburse the amount ordered by the Court to Ms. Sawyer. Instead, on July 29, 2010, Mr. Foley wrote a check to Ms. Sawyer from his client trust account for \$20,442.12, retaining the \$13,830.90 balance of her award for his legal fees.
42. When he retained this amount, Mr. Foley was owed fees for his trial preparation and work during trial. He recalls that he and Ms. Sawyer spoke about appealing the divorce decree. Ms. Sawyer expressed a desire to appeal.
43. When Mr. Foley mailed Ms. Sawyer the check, he also included the summary of "activity," in which he (for the first time) re-created estimated time spent on her matter, as a final accounting of sorts.
44. The balance on hand in the client trust account from the escrow account for Ms. Sawyer after this disbursement should have been \$13,875.40. However, the bank statement shows that Mr. Foley's client trust account's ending balance, as of July 31, 2010, was \$32,461.51 (this was because the \$20,442.12 check to Ms. Sawyer had not yet cleared).
45. Deducting \$20,442.12 from the ending balance results in a net balance of \$12,020.39. This amount is less than what should have been held for Ms. Sawyer, irrespective of funds that Mr. Foley may have been holding for other clients.
46. At the time of this final disbursement from the escrow account, Mr. Foley had no contemporaneously-created time and billing records pertaining to his representation of Ms. Sawyer.
47. The total amount of the retainers received by Mr. Foley over the course of representation was \$25,469.00.⁴ Of that amount, legal fees in the amount of \$17,720.00 were represented to the client as earned (per Mr. Foley's July 2010 Summary of Activity). Therefore, there was a balance of \$7,749.00 which was not earned at the conclusion of the representation and should have been available for return to the client.

³ This amount is \$2.50 less than what the Court had ordered. Upon information and belief, this amount represents part or all of a bank fee.

⁴ This amount does not include various filing fees and costs that totaled \$1,330.40. One of the costs was \$900 to the CPA firm of Dinowitz & Bove, of which \$519 was refunded to Mr. Foley in December 2010. Mr. Foley did not inform Ms. Sawyer of this refund.

48. Mr. Foley and Ms. Sawyer discussed appealing the family court's decision. Ms. Sawyer agreed to go forward with an appeal.
49. According to Mr. Foley's summary of activity, he anticipated additional fees of \$5,000 to cover his work on the appeal. Although Mr. Foley told Ms. Sawyer his fees for the appeal would be a flat fee and not hours-based, he never communicated to Ms. Sawyer the actual amount of the flat fee.
50. Mr. Foley filed the Notice of Appeal in July 2010 and his brief on December 31, 2010.
51. Ms. Sawyer hired new counsel, who filed the Reply Brief before the Supreme Court.
52. The New Hampshire Supreme Court issued an order on May 25, 2011, affirming the Portsmouth Family Division's disposition of the marital case and dismissing the appeal.
53. Deducting the \$5,000 flat fee for the appeal, Mr. Foley's client trust account should have had a balance of at least \$3,268.00 on hand for Ms. Sawyer.
54. The ending balance in his client trust account as of December 31, 2010 account was \$1,514.15.
55. Recognizing that Ms. Sawyer was due a refund, and regretting his failure to contemporaneously track his time spent on her matter, Mr. Foley refunded \$5,000 to Ms. Sawyer in June of 2011.

**Monthly Reconciliations and Annual Trust Accounting
Compliance Certificates**

56. For the reporting periods of June 1, 2007 through May 31, 2012, Mr. Foley did not perform monthly reconciliations of any of his client trust accounts to disclose: (a) the balance of the account according to the bank's records; (b) the balance of the account according to Mr. Foley's law firm records; (c) a detailed listing of differences between (a) and (b); (d) a listing of all clients' funds in the account as of the reconciliation date; and (e) a detailed listing of differences between (b) and (d). *See Sup. Ct. R. 50.*
57. In September 2008, September 2009, August 2010, November 2011, and July 2012, Mr. Foley signed (and later filed) Annual Trust Accounting Compliance Certificates (Certificates) certifying that, in each of the applicable reporting periods (covering June 1, 2007 to May 31, 2012), he performed monthly reconciliations for each client who had funds in a New Hampshire trust account

maintained by Mr. Foley, in accordance with New Hampshire Supreme Court Rule 50(2)F, and that all client funds were held in accounts in full compliance with Rule 50 and Rule 1.15.

58. Mr. Foley also certified that in all but one of the applicable reporting periods, he was not “out of trust.” Mr. Foley left blank the certification in that regard for the 2010-2011 reporting period.
59. Mr. Foley did not maintain and record his client trust account(s) in accordance with Rule 50 during any of the aforementioned reporting periods.
60. Mr. Foley failed to list the NECU escrow account as a “New Hampshire trust account” in his Annual Trust Accounting Compliance Certificates for the periods covering (1) June 1, 2009 through May 31, 2010 and (2) June 1, 2010 through May 31, 2011. The NECU escrow account was opened on September 24, 2009 and closed on July 8, 2010.
61. The Certificates filed by Mr. Foley in regard to each of the aforementioned reporting periods falsely certified that Mr. Foley had maintained and recorded his client trust accounts in accordance with Rule 50 and Rule 1.15.

II. RULINGS OF LAW

The Professional Conduct Committee voted to accept the Stipulation as to the following violations of the Rules of Professional Conduct, by clear and convincing evidence:

Rule 1.4: Client Communication

62. Mr. Foley owed Ms. Sawyer a duty to keep her reasonably informed about the manner in which Mr. Foley was representing her interests, the status of the matter at various times, the accumulated and anticipated costs of representation, and the requirements for payment.
63. Mr. Foley breached that duty by:
 - a. failing to discuss with Ms. Sawyer in sufficient detail the financial terms under which he agreed to serve as her counsel, including requirements for making payments and maintaining a retainer account;
 - b. receiving funds from Court-authorized distributions from the escrow account that belonged to Ms. Sawyer without promptly notifying Ms. Sawyer and tendering all of such funds to her;

- c. failing to obtain Ms. Sawyer's authority to take all or portions of distributions from the escrow account for legal fees; and
- d. failing to communicate a specific amount for the flat fee he charged for the appeal.

**Rule 1.15(a), (b), (d), and (f): Safekeeping Property and
New Hampshire Supreme Court Rule 50:**

- 64. Mr. Foley owed Ms. Sawyer a duty to:
 - a. deposit and hold Ms. Sawyer's funds in a client trust account separate from Mr. Foley's property and maintained in accordance with Supreme Court Rules;
 - b. maintain records of the handling, maintenance, and disposition of all of Ms. Sawyer's funds in accordance with Supreme Court Rules;
 - c. deposit into the client trust account legal fees and expenses paid in advance by Ms. Sawyer, to be withdrawn by Mr. Foley only as fees were earned or expenses incurred; and
 - d. promptly notify Ms. Sawyer upon receipt of funds belonging to her and to deliver such funds to her.
- 65. Mr. Foley breached these duties by:
 - a. co-mingling funds belonging to Ms. Sawyer with Mr. Foley's property;
 - b. failing to maintain records of the handling, maintenance, and disposition of all of Ms. Sawyer's funds in accordance with Supreme Court Rules, including failing to account for funds belonging to Ms. Sawyer and to perform monthly reconciliations relative to funds for Ms. Sawyer;
 - c. withdrawing fees and expenses paid in advance by Ms. Sawyer before Mr. Foley earned the fees or incurred the expenses; and
 - d. receiving funds from Court-authorized distributions from the escrow account that belonged to Ms. Sawyer without promptly notifying Ms. Sawyer and tendering all of such funds to her.
- 66. Under the foregoing circumstances, there is clear and convincing evidence of a violation of Rules of Professional Conduct 1.15(a), (b), (d), and (f) and Supreme Court Rule 50.

Rule 8.4(a): General Rule

Having found the foregoing violations, there is clear and convincing evidence that Mr. Foley's conduct violated Rule of Professional Conduct 8.4(a).

III. ANALYSIS

The purpose of the Court's disciplinary power is "protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future." *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 *American Bar Association's Standards for Imposing Lawyer Sanctions (2005)* ("*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*, 156 N.H. 613, 621 (2007)); *Standards* § 3.0.

The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. *See Conner's Case*, 158 N.H. at 303 (stating that "[i]n applying these factors, the first step is to categorize the respondent's misconduct and identify the appropriate sanction"). 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. *See id.* (stating that "[a]fter determining the sanction, [the Court] consider[s] the effect of any aggravating or mitigating factors on the ultimate sanction"). In the case of multiple charges of misconduct, the ABA recommends that

the sanction imposed “should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct.” *Id.* (citing *Richmond’s Case*, 152 N.H. 155, 160 (2005)).

Under the first prong of the analysis, Mr. Foley violated duties owed to Ms. Sawyer as well as to the Court. He failed to properly safeguard Ms. Sawyer’s funds and to properly account for and report on the maintenance and handling of his client trust accounts. He failed to communicate with her regarding the amount of retainer he kept from the escrow account and the hours spent on her matter so that she could understand how that retainer was being exhausted. He filed Annual Trust Accounting Compliance Certificates which falsely stated that he was in compliance with Rule 1.15 and Rule 50.

Under the second prong of the analysis, Mr. Foley knew or should have known that he was violating Rule 1.15 and Rule 50. Mr. Foley’s breaches were fundamental, evincing a lack of understanding of even the basics of law office accounting procedures. For example, he deposited an unearned retainer into his operating account rather than his client trust account (paragraph 13, *supra*), failed to account in any form for another \$5,000 retainer (paragraph 21, *supra*), and represented to the court that fees were “exhausted,” when he has admitted he kept no contemporaneous billing records that could substantiate time spent on Ms. Sawyer’s matter (paragraph 30, *supra*). Under these circumstances the parties agree that Mr. Foley knew or should have known that his conduct violated Rule 1.15 and Rule 50. A negligent mental state is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will

follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

Under the third prong of the analysis, the actual and potential injury of Mr. Foley’s conduct is assessed. Mr. Foley caused harm or potential harm to Ms. Sawyer and other clients by:

- a. leaving Ms. Sawyer uninformed concerning the amount of retainer that was being earned as fees, as well as the balance of such retainer;
- b. failing to obtain her approval for retaining specific amounts as retainers for ongoing work in her divorce;
- c. being out of trust as to Ms. Sawyer’s matter; and
- d. co-mingling client funds with his own, thereby subjecting his clients’ property to possible claims against Mr. Foley or his firm. *See Commentary, Standards, § 4.12.*

Mr. Foley caused harm to the legal profession by operating his office in such a way as to raise the question whether lawyers can be trusted to manage and account for their clients’ funds properly and by leaving the Court and the public in doubt as to the viability of trust accounting and certification requirements contemplated under Rule 50. The *Standards* provide material guidance for determining a baseline sanction. Mr. Foley’s failure to properly maintain the client trust account involved breaches of Mr. Foley’s duty to protect the interests and property of his clients. Section 4.1 of the *Standards* provides, in pertinent part, as follows:

- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.13 Reprimand⁵ is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a

⁵ Section 4.13 uses the term “Reprimand.” The most analogous sanction in New Hampshire is a Public Censure.

client.

Standard 4.12 is unique among the *Standards* because it allows for a baseline suspension under a “should have known” standard, which is essentially a negligence standard. *Standards*, § 4.12; Commentary (“lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended”). Mr. Foley’s failure to comply with Rule 50, regarding the filing of accurate trust accounting compliance certificates, involved a breach of duty owed to the legal system and to the Court. *Standards* § 6.1 (False Statements, Fraud and Misrepresentation) provides, in pertinent part, as follows:

- 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 [public censure] 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.

The parties agree that Mr. Foley did not have a specific intent a) to disregard the client trust account reconciliation requirements of Rule 50; b) to be “out of trust”; or c) to deceive the Court in filing his annual trust accounting compliance certificates. However, Mr. Foley acknowledges that he had the knowledge, information, and opportunity to determine whether he was in compliance with Rule 50, but that he did not so determine, and that he nevertheless certified his compliance with the rule.

- a. The parties thus agree that Mr. Foley knew or should have known that he was breaching his duties under Rule 50.

- b. Under the foregoing circumstances, the parties agree that the combined baseline sanction for Mr. Foley's conduct is suspension.
- c. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.
- d. In this case, two aggravating factors are present: Mr. Foley's substantial experience in the practice of law; and two prior Warnings: #00-N-118 on September 27, 2002, and #10-057 on April 25, 2011.

Mitigating factors include the following:

- a. Good faith effort to make restitution and rectify consequences of misconduct;
- b. Full disclosure to the ADO and his cooperative attitude in the proceedings;
- c. Expression of remorse and his acceptance of responsibility; and
- d. Absence of a dishonest or selfish motive. *See Standards* § 9.22 and 9.32.

Mr. Foley refunded \$5,000 to Ms. Sawyer and has taken steps to improve his office practices. He now uses written fee agreements in all matters. He employs a bookkeeper who uses QuickBooks to keep separate client ledgers and conduct Mr. Foley's monthly reconciliations. He contemporaneously tracks time spent on each client matter and now sends monthly statements to clients to keep them apprised of their running balances.

The ADO has reviewed these documents and approves of their content.

The aggravating and mitigating factors evident in this case, combined with the baseline sanction analysis, indicate that a six-month suspension stayed for one year, combined with conditions designed to ensure implementation of effective remedial measures, is an appropriate

sanction. This sanction is proportional to discipline imposed in other cases involving breaches of Rule 1.15.⁶

The ADO and Respondent have joined in this recommendation, in part, because of Mr. Foley's commitment to take remedial action as set forth in Paragraph 99 of the Stipulation, to ensure that a) bookkeeping, accounting, and reporting practices are well-defined and that monthly client trust account reconciliations shall be consistently applied, and are performed in full compliance with Rule 50; b) his written fee agreements clearly set forth his hourly rate, billing practices, and scope of representation; and c) he completes six hours of CLE, in addition

⁶ New Hampshire case law regarding stayed suspensions is sparse. *See Morgan's Case*, 143 N.H. 475 (1999) (imposing two-year suspension stayed where lawyer discovered substantial shortage in his client trust account, supplemented it with his own funds, investigated the matter, and self-reported his conduct). Other jurisdictions have imposed stayed suspensions, with conditions, where Respondents have breached their obligations regarding client trust accounts. *See, e.g., In re Suarez*, 984 N.E.2d 1233 (Ind. 2013) (imposing a sixty-day suspension, all stayed, subject to a two-year probationary period, where the attorney overdrew his client trust account, commingled funds, made unauthorized withdrawals, and failed to maintain proper trust account records); *In re Aguilar*, 984 N.E.2d 1235 (Ind. 2013) (imposing a thirty-day suspension, all stayed, subject to a two-year probationary period, where the attorney overdrew his client trust account, failed to maintain proper records of that account, failed to obtain proper authorization for withdrawals from that account, and failed to adequately respond to requests for information from Indiana's Supreme Court Disciplinary Commission); *In re Small*, 818 N.E.2d 466 (Ind. 2004) (imposing a six-month suspension, all stayed, subject to a two-year probationary period where the attorney's "neglect, oversight, and ignorance" of proper trust accounting procedures led to an overdraw, a failure to keep adequate records, and the general mismanagement of his client trust account); *Disciplinary Counsel v. Dockery*, 979 N.E.2d 313 (Ohio 2012) (imposing a one-year suspension, all stayed, subject to a one-year probationary period, where the attorney commingled funds, failed to maintain proper records of his client trust account, and failed to properly reconcile that account); *Mahoning Cnty. Bar Ass'n v. Palombaro*, 904 N.E.2d 529 (Ohio 2009) (imposing a one-year suspension, all stayed, subject to conditions, where the attorney commingled funds, failed to keep proper records of his client trust account, overdrew his client trust account, and failed to communicate sufficiently with his clients); *In re Small*, 818 N.E.2d 466 (Ind. 2004) (imposing a six-month suspension, all stayed, subject to a two-year probationary period where the attorney's "neglect, oversight, and ignorance" of proper trust accounting procedures led to an overdraw, a failure to keep adequate records, and the general mismanagement of his client trust account).

to the minimum yearly CLE requirements, regarding how to properly handle his client trust account and comply with Rule 1.15 and Rule 50.

Conditions of Stayed Suspension:

Mr. Foley agrees to comply with the following conditions during the year of stayed suspension:

- a. Mr. Foley shall provide written fee agreements to clients for all matters that he undertakes. Those agreements shall set forth: scope of representation, hourly rate, his procedure for billing clients, and, in cases in which he accepts a retainer, the method for replenishing such retainer.
- b. Mr. Foley shall contemporaneously track time spent on client matters. He shall bill clients monthly and send with such bill an accounting of time spent on the matter. Where he holds a retainer, such bill shall set forth the balance of such retainer.
- c. Mr. Foley shall complete six hours of CLE, in addition to the minimum yearly CLE requirements, regarding how to properly handle his client trust account and comply with Rule 1.15 and Rule 50.
- d. Within 14 days of the approval of this Stipulation by the PCC, Mr. Foley shall identify a Certified Public Accountant whom he will pay to identify and implement satisfactory accounting practices and procedures in Mr. Foley's office designed to ensure compliance with Rule 50. The ADO shall have 14 days to approve the suggested CPA.
- e. Upon approval by the ADO, Mr. Foley shall, within 45 days of said approval, obtain and file a report from the CPA confirming implementation of satisfactory accounting practices and procedures in Mr. Foley's office designed to ensure compliance with Rule 50, and reporting on current monthly reconciliations of the client trust account. The CPA's report shall also include any recommendations for further remedial action. Mr. Foley agrees to implement such additional measures and to report to the ADO on his satisfactory compliance therewith within 30 days of the issuance of such report.
- f. Beginning on the 15th day of the month following submission of the CPA's report described in Paragraph 94(e), Mr. Foley shall file with the ADO his monthly client trust account reconciliations for a period of twelve consecutive months. Such reconciliations shall be submitted to the ADO by the 15th day of each month.

In the event Mr. Foley fails to comply with any of the foregoing conditions, he will be subject to an order to show cause why he should not be found in contempt. In the event he is ordered to show cause, Mr. Foley shall be entitled to an evidentiary hearing. If after such hearing, Mr. Foley is found in contempt; his six month suspension shall become immediately effective.

IV. SANCTION

Having accepted the Stipulation as to the Facts and Rule violations, the Committee agrees with the Stipulation as to sanction. The appropriate discipline in this matter is a six month suspension stayed for one year with conditions.

V. COSTS

The Professional Conduct Committee accepts the Stipulation that Mr. Foley agrees to pay the expenses incurred by the Committee in the investigation and enforcement of this disciplinary matter. *See* Sup. Ct. R. 37(19)(b). Costs can include, but are not limited to: mileage, stenographers, transcripts, copying, inventory and audit expenses. The assessment shall become final unless Mr. Foley responds in writing, within thirty (30) days of receipt of the Committee's statement of expenses, listing each disputed expense and explaining the reasons for disagreement. Sup. Ct. R. 37(19)(b). The Committee may resolve the matter, or enforce the assessment by petition to the superior court in any county in the state. Sup. Ct. R. 37(19)(b).


The Committee may file a copy of the final assessment with the superior court in any county in the state, where it shall be docketed as a final judgment and shall be subject to all legally-available post-judgment enforcement remedies and procedures. *See* Sup. Ct. R. 37(19)(c).

The Respondent shall be responsible for all costs incurred as a result of the Attorney Discipline Office's collection efforts.

VI. CONCLUSION

For all of the above reasons, the Professional Conduct Committee issues a six month suspension, stayed for one year with conditions, to Richard N. Foley, for violating Rule of Professional Conduct 1.4: Client Communication, Rule of Professional Conduct 1.15: Safekeeping Property, Rule of Professional Conduct 8.4(a): General Rule; and Supreme Court Rule 50.

September 20, 2013



David M. Rothstein, Chair

Distribution:

Sara S. Greene, Disciplinary Counsel
Stephen L. Tober, Esquire
File

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
Susan R. Chollet*
Thomas P. Connair
Alan J. Cronheim
Richard H. Darling*

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

Elaine Holden*
Heather E. Krans
Richard D. Sager
Martha Van Oot
Mary Elizabeth Tenn
* non attorney member
Holly B. Fazzino, Administrator


Foley, Richard N. advs. Robin Sawyer # 11-011

AMENDMENT TO SUSPENSION

On December 10, 2013, the Professional Conduct Committee (the "Committee") deliberated the assented-to request to extend the period of stayed suspension. Members present included David M. Rothstein, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Susan R. Chollet, Thomas P. Connair, Alan J. Cronheim, Richard H. Darling, Elaine Holden, Heather E. Krans and Martha Van Oot. Richard D. Sager and Mary Elizabeth Tenn was absent.

Upon consideration, the Committee voted to extend the period of stayed suspension from one year to up to 18 months, or until the conditions are satisfied.

December 11, 2013



David M. Rothstein
Chair

Distribution:

Sara S. Greene, Disciplinary Counsel
Stephen L. Tober, Esquire
File

New Hampshire Supreme Court

Attorney Discipline Office

Janet F. DeVito
General Counsel

James L. Kruse
Deputy General Counsel

Brian R. Moushegian
Assistant General Counsel

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

Sara S. Greene
Disciplinary Counsel

Elizabeth M. Murphy
Assistant Disciplinary Counsel

Craig A. Calaman, CPA
Staff Auditor

February 17, 2015

Hand-Delivered

Barbara J. Guay
New Hampshire Supreme Court
Professional Conduct Committee
4 Chenell Drive, Suite 102
Concord, New Hampshire 03301

Re: Foley, Richard N. advs. Robin Sawyer - #11-011

Dear Ms. Guay:

I am writing to inform the Committee that Richard N. Foley, Esq. has completed the monitoring requirements listed in the order issued by the Professional Conduct Committee on September 20, 2013. Mr. Foley has also paid all costs associated with the matter.

Accordingly, Mr. Foley is no longer subject to the terms of the stayed suspension in effect from September 30, 2013 until conditions are satisfied, as per the PCC's Amendment to Suspension issued on December 11, 2013.

In light of the above facts, I am asking that the Committee close this matter.

Please feel free to contact me if you need any further information.

Sincerely,



Sara S. Greene
Disciplinary Counsel

SSG/ges

cc: Stephen L. Tober, Esquire

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

David M. Rothstein, Chair
Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
Peter G. Beeson
Susan R. Chollet*
Richard H. Darling*
Margaret R. Kerouac

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

Mona T. Movafaghi
Georges J. Roy*
David W. Ruoff
Richard D. Sager
Martha Van Oot
* non attorney member
Barbara J. Guay, Legal Assistant


Foley, Richard N. advs. Robin Sawyer #11-011

CLOSED

On March 17, 2015, the Professional Conduct Committee deliberated the above captioned matter. Members present included David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Peter G. Beeson (via teleconference), Susan R. Chollet, Margaret R. Kerouac, Mona T. Movafaghi, Georges J. Roy, David W. Ruoff, Richard D. Sager and Martha Van Oot. Richard H. Darling was absent.

Upon consideration, the Committee voted to close the matter.

March 18, 2015



David M. Rothstein
Chair

Distribution:

Sara S. Greene, Disciplinary Counsel
Stephen L. Tober, Esquire
File