

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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REISSUED PUBLIC CENSURE

On February 18, 2014, the Professional Conduct Committee (the "Committee") heard oral argument and deliberated the issues raised by the Limited Appeal Regarding Rule Violations ("Limited Appeal"), filed by the Attorney Discipline Office ("ADO"), and the Objection of Finis E. Williams, III ("Mr. Williams") to the ADO's Limited Appeal, as well as the parties' arguments regarding sanctions. Members present included: David M. Rothstein, Chair, Benette Pizzimenti, Vice Chair, Elaine Holden, Vice Chair, Richard H. Darling, Heather E. Krans, Richard D. Sager, Martha Van Oot and Mary Elizabeth Tenn. Peter G. Beeson and Susan R. Chollet were absent. Alan J. Cronheim was recused and not present.

Oral argument was presented by Sara S. Greene, Disciplinary Counsel, on behalf of the ADO, and James C. Wheat, Esquire, on behalf of the Respondent. Finis E. Williams, III, Esquire, and Gladys Strickhart, Legal Assistant to Ms. Greene, were also present.

The Committee reviewed the record, including but not limited to the First Amended Notice of Charges ("FANC"), the Answer of Mr. Williams ("Answ."), the Joint Exhibits ("Exh.") submitted to the Hearing Panel, the hearing transcript ("T") and the Hearing Panel Report. For the reasons stated herein, the Committee determined that Mr. Williams should be publicly censured for violating Rules 1.15(f) and 1.15(g) of the New Hampshire Rules of Professional Conduct.

I. FINDINGS OF FACT

The Committee determined and the parties agreed that the facts set forth at pp. 3-10 of the Hearing Panel Report were not in dispute. The Committee summarizes those facts, with references to the record, as follows:

1. Respondent, Finis E. Williams, III, is an attorney admitted to the New Hampshire Bar in 1985. T 120. Mr. Williams was previously admitted to practice law in Illinois in 1981, but his admission there is no longer active. T 120, Answ. ¶2.

2. Attorney Jed Callen, who represented the plaintiff, Ossipee Bluffs Association (“OBA”), in a nuisance lawsuit filed against Mr. Williams’ client, Donald E. Lee, Sr., referred this matter to the Attorney Discipline Office (the “ADO”) in December 2011. Exh. 1. The underlying civil matter ultimately giving rise to this disciplinary action was a nuisance action brought in 2004. Exh. 4, p. 71.

3. Lee owns property on Lake Ossipee, near the Lovell River and the OBA development. Exh. 2, pp. 17-18. Lee constructed two unauthorized breakwaters in Lake Ossipee, to the detriment of OBA. Exh. 2, pp. 17-19. The New Hampshire Department of Environmental Services (“DES”) issued two Administrative Orders against Lee, which required him to remove the breakwaters. *Id.* The DES also recorded the Administrative Orders at the Registry of Deeds to serve as liens on Lee’s property. *Id.*

4. OBA sought injunctive relief to remove the breakwaters and the sandbar that had developed in the lake, so as to restore the Lovell River’s “fan-shaped delta.” Exh. 2, pp. 17-18; Exh. 4. In an order dated September 27, 2006, the Carroll County Superior Court found that Lee’s actions constituted a private nuisance and ordered Lee to pay for remediation. Exh. 4, pp. 71-83. Specifically, Lee was ordered to apply “forthwith,” at his sole expense, for a DES permit to remove certain material that his actions had caused to be placed in the lake. Exh. 4, pp. 82-83. Lee was to also contract with the necessary technical experts and professionals (for example, engineers) to “implement the removal plan.” *Id.*

5. After the Court issued its decision in the nuisance action, Mr. Williams filed a notice of appearance on behalf of Lee on April 2, 2007. Exh. 2, pp. 17-18; Exh. 3, p. 69. Lee became delinquent in legal fees owed to Mr. Williams and in other fees owed to the engineer he hired. Exh. 2, p. 19. Mr. Williams ultimately negotiated a Subordination Agreement with the Attorney General’s Office on behalf of Lee in 2009 addressing DES’s lien against Lee’s property. Exh. 2, p. 19; Exh. 5. The Subordination Agreement allowed Lee to borrow funds against his house to “be used solely for payment of expenses, including attorney’s fees, engineering costs or other costs and expenses directly related to remedial actions either ordered by the Court or the State. . .” Exh. 5, pp. 106-07; Ex. 2, p. 19.

6. On January 27, 2010, the Court issued an order (“the January Order”) which addressed Lee’s attempts to procure a DES permit. Exh. 6. The Court found that Lee had made diligent, but ultimately unsuccessful, efforts to comply with the previous order regarding remediation. Exh. 6, pp. 120-22. The Court ordered that OBA’s expert would become the “lead” expert “in charge of” developing a plan and permit application to submit to DES. Exh. 6, p. 122. Lee was ordered to pay for “any fees and charges associated with devising and submitting said plan.” *Id.*

7. The January Order also vacated an *ex parte* attachment against Lee's property that had previously been granted at the request of OBA. Exh. 6, p. 123. The Court ordered: "any money Lee acquires as a loan from a bank encumbering subject property must be used and managed in accordance with the Subordination Agreement between Lee and the State of New Hampshire." Exh. 6, pp. 123-24. The Order quoted the Subordination Agreement as follows: "the amount of net monies obtained from any bank loan would be used solely for payment of expenses, including attorney's fees, engineering costs or other costs and expenses directly related to remedial actions either ordered by the Court or the State regarding the cases of *Ossipee Bluffs Association v. Donald R. Lee, Sr.*, . . . and *State v. Donald R. Lee, Sr.*" Exh. 6, p. 124. By its incorporation of the Subordination Agreement, the January Order authorized the payment of attorneys' fees "directly related to remedial actions" incurred by either party. *Id.* The Order further stated that "monies received from the bank loan encumbering Lee's subject property shall be placed in an escrow account in the name of Lee's attorney, Finis E. Williams, III and managed according to the aforementioned provisions." *Id.*

8. The January Order, in essence, appointed Mr. Williams, Lee's attorney, as escrow agent for funds in which OBA had an interest. At this time, Mr. Williams had a fiduciary responsibility to OBA, in addition to his professional responsibility as a lawyer to his client. In April 2010, Lee procured a loan encumbering his Ossipee property and caused \$35,000 to be placed in the escrow account to be maintained by Mr. Williams. FANC ¶ 21; Answ. ¶ 21; Exh. 7. On May 11, 2010, Mr. Williams disbursed \$16,641.29 to himself from the escrow account.¹

9. On August 25, 2010, Mr. Callen moved to transfer the escrow fund to himself for the benefit of OBA, alerting the Court to Mr. Williams' May payment to himself, in a pleading captioned "Supplemental Argument: Hearing of August 17, 2010. Exh. 9, pp. 131-32. Mr. Williams understood that the pleading filed on behalf of the OBA sought to transfer control of the escrowed funds to Callen. T. 143. On August 31, 2010, Mr. Williams disbursed \$2,981.14 from the escrow account to himself for legal fees. Exh. 7.

10. On September 7, 2010, the Court issued an order ("the September Order") regarding use of the escrow funds. Exh. 10. The September Order clarified Lee's obligation to pay for the permit application process. It stated, in pertinent part:

- B. Clarification of Respondent's [Lee's] Obligation to Pay for Permit Application Process: That the Respondent shall be responsible for payment of all Petitioner's [OBA's] costs directly associated with the creation of the remedial design required for the DES permit application, the production and submission of the DES permit Application, and Petitioner's [OBA's] necessary participation in the DES approval process from submission

¹ Mr. Williams had Lee's permission to withdraw legal fees from the escrow account. T 155. Upon withdrawing money from the escrow account, Mr. Williams deposited all payments into his operating account. Exh. 34; T 145.

through the issuance of a DES permit. Such fees include Petitioner's [OBA's] necessary legal, engineering, clerical, permit fees and any other costs necessary to Petitioner's [OBA's] efforts to procure the DES remediation Permit. Upon receipt of Petitioner's [OBA's] monthly invoice for such Permit related expenditures, the Respondent [Lee] shall, within thirty (30) days, pay the Petitioner [OBA] in full or pay any undisputed charges, and file a detailed objection as to any disputed charges with the Court. If the Respondent [Lee] fails to pay the Petitioner's [OBA's] invoices in full within thirty (30) days and fails to object timely to same, as reviewed above, the Respondent [Lee] shall have the burden of persuading the Court that the disputed charges are not compensable under the terms of this Court's Orders. In reference to cost(s) that the Respondent [Lee] does not pay but timely objects to, the burden shall be on the Petitioner [OBA] to show that same fall(s) within the parameters of this Order and/or that of earlier Orders.

- D. That the Respondent [Lee] shall, if not already accomplished, transfer the \$8,524.65 remaining as of 6-4-10 into the escrow account held by Respondent's counsel [Mr. Williams], *to be used exclusively for payment of costs and fees incurred by OBA in producing the DES permit Application; and any and all additional funds borrowed against Respondent's [Lee's] Ossipee properties shall be [sic] likewise continue to be held in escrow by Respondent's counsel [Mr. Williams] for that purpose, and for the purpose of paying for implementation of any approved remediation.*

Exh. 10, pp. 141-42 (emphasis supplied).

11. On September 16, 2010, Mr. Williams filed a Motion for Reconsideration and Clarification of the September Order. Exh. 11. He sought "clarification that he [Lee] is still entitled to comply with the Subordination Agreement and the Court was not issuing an order that Mr. Lee is barred from paying his own fees in connection with this case." Exh. 11, p. 152. He reiterated this request in a reply dated September 29, 2010, when he asked the court to "[o]rder that respondent [Lee] may still abide by the Subordination Agreement with the State of New Hampshire which permits him to use monies when necessary to pay engineering and attorney's fees in connection with said case." Exh. 13, p. 175.

12. OBA objected to an order allowing Lee to pay Mr. Williams from the escrow account. Exh. 12, pp. 159-61. OBA asked the Court to "[c]onsider whether the \$16,641.29 in legal fees removed from escrow [in May 2010] and paid to Respondent's counsel [Mr. Williams], was proper under the terms of this Court's January 2010 Order." Exh. 12, p. 161. On September 30, 2010, the Court denied Mr. Williams' Motion for Reconsideration and

Clarification, leaving intact the September Order and denying OBA's request that the Court consider whether Mr. Williams' May 2010 payment to himself violated the Court's January order. Exh. 14.

13. On September 10, 2010, Mr. Callen submitted an invoice for payment of his legal fees from the escrow account in the amount of \$3,580. Exh. 12, p. 163. Mr. Williams contested this invoice in a Motion dated October 8, 2010. Exh. 15. On October 20, 2010, the Court denied Mr. Williams' Motion and ordered that Mr. Williams pay that amount "forthwith." Exh. 16.

14. Lee filed a Notice of Appeal with the New Hampshire Supreme Court on November 1, 2010 (Case No. 2010-740). Exh. 17. Williams appealed, *inter alia*, the issue of whether his client should have to pay OBA's attorney's fees without a finding of bad faith or application of the "substantial benefit" rule. Exh. 17, p. 410. On November 1, 2010, Mr. Williams did offer to pay "said attorneys' fees...in escrow to the Court pending appeal," *see* Exh. 42, an offer that was not acted upon by the Court or the OBA.

15. In November 2010, Lee deposited \$10,000 into the escrow account, and in December 2010 he deposited another \$25,000 into the escrow account. Exh. 7. On January 6, 2011, Mr. Williams disbursed to himself as legal fees \$6,462.06 from the escrow account. *Id.*

16. Mr. Callen filed a Motion for Contempt dated December 14, 2010 regarding Mr. Williams' failure to pay the \$3,580 invoice. Exh. 18. On January 19, 2011, the Court stayed all pending motions until final disposition of the appeal. Exh. 19.

17. On February 18, 2011, Mr. Callen wrote a letter to Mr. Williams asking how Mr. Williams could "square" continuing to pay himself his legal fees out of escrow given the Court's September Order. Exh. 56. Mr. Callen subsequently filed an Emergency Motion for Contempt, Disgorgement, Attachment and Sanctions, to which Mr. Williams objected. Exh. 20; Exh. 21.

18. On August 12, 2011, Mr. Williams paid himself \$16,181.75 out of the escrow funds. Exh. 7. Mr. Callen filed a supplement to his Emergency Motion to inform the Court of such payment. Exh. 22. On September 12, 2011, Mr. Williams paid himself \$1,266.69 out of the escrow funds. Exh. 7.

19. On September 29, 2011, the Supreme Court issued an order in Lee's appeal, affirming the Court's September Order. Exh. 23. Mr. Williams then filed a Motion for Reconsideration, which the Supreme Court denied on November 9, 2011. Exh. 25; Exh. 26. Shortly thereafter, on November 17, 2011, Lee filed a Suggestion of Bankruptcy. Exh. 27. On November 23, 2011, the Court stayed the matter pending a ruling in the bankruptcy case. Exh. 28.

20. On November 30, 2011, Mr. Williams filed a Motion to Withdraw as counsel for Lee, to which Callen objected. Exh. 29; Exh. 30. The Court granted Mr. Williams' Motion to Withdraw on February 2, 2012, but ordered that Mr. Williams would "continue to hold in escrow

funds in his trust account placed there consistent with earlier Court Order(s),” would continue to receive notices from the Court, and would be required to appear in any further proceedings involving pending issues relating to Mr. Williams’ payments to himself from the escrow account. Exh. 31, pp. 321-22.

21. On September 18, 2012, the Bankruptcy Court ruled that the escrow account was not part of the bankruptcy estate. Exh. 32, p. 329. Mr. Williams did not at that time pay Mr. Callen \$3,580 as previously ordered, testifying that he forgot. T 152. Mr. Williams was removed as escrow agent on March 29, 2013. Exh. 35.

22. On Mr. Callen’s Motion for Contempt, Disgorgement, Attachment and Sanctions, the Superior Court found that the September Order “unambiguously limited the withdrawal of funds from the escrow account ‘exclusively for payment of costs and fees incurred by OBA in producing the DES permit Application . . . and for the purpose of paying for implementation of any approved remediation.’” Exh. 33, p. 356. The Court continued, stating that the quoted language from the September Order was:

consistent with the purpose for which the escrow account was created—to provide a pool of funds for the petitioner [OBA] to draw from to remediate the site to the satisfaction of the DES. To allow the respondent [Lee] to use the escrow account to pay his legal bills would undermine the purpose of the account.

Id.

23. The Court ordered Mr. Williams to disgorge payments he made to himself after the September Order, for a total of \$24,535.50. *Id.* While the Court ordered disgorgement, it declined to impose sanctions on Mr. Williams. Exh. 33, pp. 357-58. The Court held that “[b]ased upon Attorney Williams’ representations, it appears he had a genuine misunderstanding of the Court’s orders and believed, though inaccurately so, that he was entitled to withdraw funds from the escrow account for payment of the respondent’s [Lee’s] attorney’s fees and expenses.” Exh. 33, p. 358.

24. Both before the Court and in the disciplinary proceeding, Mr. Williams maintained that he read the Court’s September Order, denying Callen’s request to rule on the propriety of Mr. Williams’ May 2010 payment to himself out of escrow, as finding that Lee could continue to make payments to Mr. Williams from the escrow account. Exh. 54; T 133-39. In September 2012, Mr. Williams had offered to repay the amount he had paid himself if the Court determined that his interpretation was incorrect. Exh. 54, p. 2. In January 2013, Mr. Williams complied with the Court’s Order and returned \$24,535.50 to the escrow account. Exh. 34.

II. RULINGS OF LAW

A. The Committee concludes that the Hearing Panel erred as a matter of law when it found that Mr. Williams did not violate Rules 1.15 (f) and (g) when he failed to pay Mr. Callen \$3,580.00 as ordered by the Court.

B. The Committee finds by clear and convincing evidence that Mr. Williams violated Rule 1.15(f) when he did not promptly deliver funds to Mr. Callen which Mr. Callen was entitled to receive and did not promptly distribute to Mr. Callen that portion of the escrowed funds as to which Mr. Callen's interest was not in dispute.

C. The Committee concludes that the Hearing Panel erred when it failed to find that the payment made by Mr. Williams to himself from the escrow account on August 31, 2010 did not violate Rule 1.15 (g), when it found, by clear and convincing evidence, that each of the payments made by Mr. Williams to himself from the escrow account on January 6, 2011, August 12, 2011 and September 12, 2011 violated Rule 1.15(g).

D. The Committee finds by clear and convincing evidence that Mr. Williams violated Rule 1.15 (g) by making a payment of \$2,981.14 to himself from the escrow account on August 31, 2010, following the filing of an objection by the OBA on August 25, 2010, which triggered Mr. Williams' duty to keep the funds separate until the dispute was resolved.

E. The Committee accepted the Hearing Panel's Report to the extent that it dismissed the alleged violations of Rule 3.4(c) and Rule 1.7(a)(2) for lack of clear and convincing evidence.

III. FACTUAL ANALYSIS

The ADO alleged that Mr. Williams violated Rule 1.7(a)(2) due to a conflict of interest in his obligations to OBA and Lee. Hearing Panel Report at 1. It alleged that Mr. Williams violated Rule 1.15(g) in making payments to himself out of the escrow account three times in 2011. Hearing Panel Report at 2. The ADO alleged that Mr. Williams violated Rule 1.15 (f) and (g) when he failed to pay Mr. Callen \$3,580.00 from the escrow funds as ordered by the Court. Hearing Panel Report at 1-2. Finally, the ADO alleged that Mr. Williams violated Rule 3.4(c) by failing to pay those funds to Mr. Callen. Hearing Panel Report at 2.

After a hearing, the Hearing Panel found that Mr. Williams did not violate Rules 1.7(a)(2) or 3.4(c). Hearing Panel Report at 11. It found him in violation of Rule 1.15(g) based on the three payments in 2011. Hearing Panel Report at 10. The Panel found Mr. Williams not in violation of Rules 1.15(f) and (g) based on the non-payment to Mr. Callen, but recommended the issuance of a warning. Hearing Panel Report at 11, 15.

Based upon facts summarized above, the Committee agreed with the Hearing Panel's

conclusions with regard to the alleged violations of Rules 1.7(a)(2) and 3.4(c). The Committee also agreed with the Panel that Mr. Williams violated Rule 1.15(g) based on the three payments in 2011. However, the Committee found two additional rule violations: Mr. Williams violated Rule 1.15(g) when he made a payment to himself out of the escrow fund in August of 2010, and he violated Rules 1.5(f) and (g) when he failed to pay \$3,580.00 to Mr. Callen as ordered by the Court. In reaching its conclusion, the Committee considered the written and oral arguments made by Disciplinary Counsel in support of its request that the Committee find additional Rule violations, as well as the arguments made by Mr. Williams in support of the Hearing Panel's determination.

The ADO argued that the Hearing Panel erred in finding no violation of Rules 1.15(f) and (g) as a result of Mr. Williams' failure to pay Mr. Callen's fees of \$3,580.00 as ordered by the Court on October 10, 2010, because the Panel credited Mr. Williams' testimony that he forgot about the Order. *See* Limited Appeal at 6. The ADO argued that Rule 1.15, governing the safe-keeping of property, contains no *scienter* requirement, and pointed out that other jurisdictions have characterized Rule 1.15 as a "strict liability" scheme. *Id.* at 7-10. The ADO further argued that the Hearing Panel erred when it failed to find that Mr. Williams' payment of his fees to himself from the escrowed funds on August 31, 2010 violated Rule 1.15(g). *Id.* at 11. This payment was made by Williams after the OBA had filed a its August 25, 2010 pleading challenging Mr. Williams' right to make such payments, but before the Court issued its September Order, which the Hearing Panel found "'unambiguously' conveyed the purpose of the escrow account and the requirement that [the funds] be spent for OBA's benefit." *Id.* at 11-12.

Mr. Williams argued that the Hearing Panel did not err in finding that his failure to pay the court-ordered fees to Mr. Callen did not violate Rule 1.15(f) and (g) because it properly credited Mr. Williams' testimony that he forgot about the obligation after nearly two years of delay resulting from an appeal to the New Hampshire Supreme Court and his client's bankruptcy. *See* Objection to Limited Appeal at 6. Mr. Williams further argued that the Hearing Panel did not err in ruling that the payment of fees made by Mr. Williams to himself on August 31, 2010 did not violate Rule 1.15 (g) because: (1) the August 25, 2010 pleading filed by the OBA did not put Mr. Williams on notice of a dispute; (2) Mr. Williams did not construe the August 25, 2010 pleading as objecting to his payment of fees under the January 2010 Order; and (3) Mr. Williams did not have notice of the dispute until the September Order which made clear that the escrowed funds were to be used exclusively for the benefit of the OBA. *Id.* at 6-7. Mr. Williams disputed the ADO's characterization of the issues on appeal as legal issues, contending that both rulings by the Hearing Panel in his favor were based upon factual determinations, supported by the record.

The respective arguments of Disciplinary Counsel and the ADO were presented forcefully in their written memoranda and during oral argument. The parties agreed that the Committee could rule on all issues without remand to the Hearing Panel, including the August 31, 2010 payment, which the Hearing Panel's Report does not explicitly address. The Committee, in its deliberations, considered first the arguments advanced by the ADO for additional Rule

violations, and then addressed the parties' respective arguments on sanctions.

A. Failure to Pay Court-Ordered Attorneys' Fees

There was no dispute that Mr. Williams failed to pay Attorney Callen \$3,580.00 in attorneys' fees ordered to be paid by the Court on October 20, 2010. There was no dispute that his obligation to pay those funds was delayed until September 18, 2012 by stays issued in the appeal to the New Hampshire Supreme Court and the bankruptcy filed by his client. There is no dispute that Mr. Williams was still the escrow agent at the time the obligation to pay Mr. Callen came due and that no payment was made by Mr. Williams at that time. The Hearing Panel dismissed the alleged violations of Rules 1.5 (f) and (g) because it found that these violations were not established by clear and convincing evidence; specifically, the Panel found Mr. Williams not in violation because he forgot about the Order to pay Mr. Callen. *See* Hearing Panel Report at 11. The Committee accepted that Mr. Williams forgot about his obligation, but disagreed that the fact absolved him of liability under these rules.

Rule 1.5 (f) provides, in pertinent part, that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." Rule 1.5(g) requires that when a lawyer is "in possession of property in which one or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate until the dispute is resolved," and that the lawyer must "promptly distribute all portions of the property as to which the interests are not in dispute." Any dispute over the interest of Mr. Callen in the payment of his fees from the escrowed funds was resolved no later than September 18, 2012. Mr. Williams' failure to promptly distribute the claimed amount to Mr. Callen upon resolution of any dispute violated the clear language of Rules 1.15 (f) and (g). That Mr. Williams – and even Mr. Callen and the Court – forgot about the payment due to Mr. Callen following a significant delay in resolving the dispute does not absolve Mr. Williams of liability under Rule 1.15. The plain language of several Rules of Professional Conduct requires the ADO to prove that a respondent acted "knowingly" to establish a rule violation. *See, e.g.*, Rule 3.3(a) (candor to tribunal); Rule 3.4(c) (disobedience of obligation under rules of tribunal). No such requirement exists under Rules 1.15(f) and (g). Because the plain language of Rule 1.15(f) and (g) compelled a finding of liability on the part of Mr. Williams when he failed to discharge his fiduciary duties, without regard to his mental state, the Committee did not find it necessary to address the ADO's argument that Rule 1.15 "is a strict liability scheme," or Mr. Williams' procedural argument that the ADO had failed to raise its argument on strict liability before the Hearing Panel. *See, e.g.*, Limited Appeal at 7; Objection to Limited Appeal at 5.

B. Payment of Attorneys' Fees From The Escrow Account On August 31, 2010

Again, there was no dispute as to the timing or amount of the four payments Mr. Williams paid himself from the escrowed funds after the January Order incorporating the terms of the Subordination Agreement was issued. Mr. Williams does not contest the Hearing Panel's determination that the payment of \$6,462.06 on January 6, 2011 violated Rule 1.15 (g) on the

ground that the Court's September Order "unambiguously" restricted payments from the escrow account to payments for the benefit of OBA, and he stipulated that the payments of \$16,181.75 on August 12, 2011 and \$1,266.69 on September 12, 2011 violated Rule 1.15(g). *See* Hearing Panel Report at 5. The ADO, however, contended that the Hearing Panel erred when it failed to address whether Mr. Williams' payment of \$2,981.14 to himself on August 31, 2010 also violated Rule 1.15(g). *See* Limited Appeal at 9-11. The ADO's Limited Appeal raised the issue whether the pleading filed by the OBA on August 25, 2010 constituted notice to Mr. Williams that the OBA claimed an interest in the escrowed funds, triggering the requirement that the funds remain inviolate until any dispute was resolved. *Id.* at 12. The Committee agreed with the ADO that Mr. Williams's obligation under Rule 1.15(g) to keep the escrowed funds "separate" until the dispute was resolved and to promptly distribute any portion of the escrowed funds not in dispute was violated when he paid himself legal fees on August 31, 2010.

The plain language of Rule 1.5 (g) mandates that a lawyer in possession of any "property in which two or more persons claim an interest" *shall* keep the property separate "until the dispute is resolved." (Emphasis added). Mr. Williams was in possession of the escrowed funds as of August 25, 2010, when the OBA filed a pleading requesting that the escrowed funds be held exclusively for the benefit of OBA, a pleading filed, at least in part, because Mr. Williams's payment of fees in the amount of \$16,641.29 to himself in May of 2010 had significantly depleted the escrow account, to which his client had deposited \$35,000.00 in April of 2010. Although the Hearing Panel found that the August 25, 2010 pleading alerted the Court to Mr. Williams's payment to himself in May, and found that Mr. Williams in fact disbursed \$2,981.14 from the escrow account to himself for legal fees on August 31, 2010, its analysis addressed only the January 6, 2011 payment, concluding that the January payment violated Rule 1.15(g) because "the Court order [of September 10, 2010] unambiguously prohibited the funds to be used in that manner." Hearing Panel Report at 10-11. Thus the Panel concluded that the January 2011 payment, as well as the two subsequent payments in 2011 to which Mr. Williams stipulated, violated Rule 1.15 (g), but did not address the fourth payment alleged by the ADO to be in violation of Rule 1.15(g). *Id.*

The Committee concluded that the August 25, 2010 pleading by the OBA was sufficient, as a matter of law, to put Mr. Williams on notice that the OBA claimed an interest in the remaining escrowed funds and thus triggered his obligation to keep the escrowed account "separate" until the OBA's claim to the funds was resolved. Significantly, Mr. Williams paid himself from the escrow account without first seeking clarification from the Court as to the scope of the January Order or the validity of the May payment of his fees that was challenged by the OBA in its August 25, 2010 pleading. Although the September Order was, as found by the Hearing Panel, "unambiguous," Rule 1.15 (g) requires only a colorable "claim" by a third party to bar any unilateral distributions by the fiduciary pending resolution of the claim. *See, e.g., Douglas' Case*, 147 N.H. at 543-544 ("[W]henver there is a dispute pertaining to funds in escrow, the portion in dispute must be kept separate until the dispute is resolved.") Accordingly, the Committee finds that the Hearing Panel erred when it failed to find that a fourth violation of

Rule 1.15(g) resulted from Mr. Williams' payment of fees to himself on August 31, 2010, after the OBA disputed Mr. Williams' right to payment of his fees from the escrow account.

III. SANCTION

The Hearing Panel concluded that the appropriate sanction for Mr. Williams's violations of Rule 1.15 (g) resulting from the three payments to himself from the escrow account following the September Order was a public censure. The Panel's recommendation of public censure was based upon its determination that the presumptive baseline sanction under ABA Standard 4.1 for breach of the duty to safeguard property was suspension, which the Panel reduced to public censure by consideration of both aggravating factors (selfish but not dishonest motive, multiple violations, and Mr. Williams's experience) and mitigating factors (absence of dishonest motive, cooperation with disciplinary authorities, timely efforts at restitution, good character and reputation, remorse and other circumstances). Although the Panel did not find that Mr. Williams's failure to pay Attorney Callen's fee violated Rule 1.15 (f) and (g), it expressed concern about his failure to promptly deliver property to which a third party was entitled and issued a warning that "[i]n the future he must comply strictly with all requirements stated in Rule 1.15(f)."

The ADO did not disagree with the Hearing Panel's determination that the presumptive baseline sanction for a knowing violation of the fiduciary duty to safeguard property is suspension under ABA Standard 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."). See Limited Appeal at 12-13. Although Disciplinary Counsel had argued before the Hearing Panel that the balancing of mitigating and aggravating factors did not justify deviation from the baseline sanction of suspension, and that a suspension was consistent with New Hampshire law, specifically, *Douglas' Case*, 147 N.H. at 544 (six months suspension), see also Disciplinary Counsel's memorandum on Sanctions at 9-15, Disciplinary Counsel acknowledged that the additional Rule violations it sought on appeal would not materially change the sanction analysis. See Limited Appeal at 13.

Mr. Williams contended that the baseline sanction should be Public Censure under ABA Standard 4.13 ("Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.") In arguing that the baseline sanction should be Public Censure, and that Public Censure should be the "starting point" for any adjustment based upon mitigating or aggravating factors, Mr. Williams emphasized that Mr. Williams' payments to himself *after* the September Order were found by the Superior Court to be based upon a "genuine misunderstanding" of the Order. He distinguished his case from *O'Meara's Case*, 150 N.H. 157 (2003), and *Welts' Case*, 136 N.H. 588 (1993), where public censure was deemed to be the appropriate sanction because the conduct involved dishonesty, misrepresentation, lack of authority from the client and/or lack of remorse. At oral argument, Mr. Williams's counsel reiterated that application of the mitigating factors recognized by the Hearing Panel to a baseline sanction of a public censure would reduce the sanction to a

reprimand. See Oral Argument Transcript at 30.

The Committee, in reaching its decision that Mr. Williams should be publicly censured, recognized that “the purpose of attorney discipline is not to inflict punishment but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession and prevent similar conduct in the future.” *Grew’s Case*, 156 N.H. 361, 365 (2007) (quoting *Coddington’s Case*, 155 N.H. 66, 68 (2007)).

The Committee relied on the American Bar Association’s *Standards for Imposing Lawyers Sanctions* (2005) (*Standards*) for guidance. *Coffey’s Case*, 152 N.H. 503, 513 (2005). Following the *Standards*, the Committee considered “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; (d) the existence of aggravating or mitigating factors.” *Standards*, supra §3.0.

Under the first prong of the analysis, the Committee concluded that Mr. Williams violated Rule 1.15(g) by failing to safeguard property in violation of his fiduciary duties as an attorney when he paid himself attorney’s fees from the escrow account on four occasions, August 31, 2010, January 6, 2011, August 12, 2011 and September 12, 2011. Mr. Williams’s duty to hold the escrow money separate was triggered when OBA claimed an “interest” in those funds in its filing on August 25, 2010 to restrict the use of funds exclusively for the payment of OBA’s fees and charges. In failing to properly discharge his fiduciary obligations, Mr. Williams violated duties owed to OBA, the legal system, and the public.

Mr. Williams also violated Rule 1.15(f) and 1.15(g) by failing to pay Mr. Callen \$3,580.00 in attorney’s fees as ordered by the Court on October 20, 2010. Mr. Williams’s admission that he forgot to pay Mr. Callen did not absolve him of his professional responsibility to make the Court ordered payment, any more than his misunderstanding of the Court’s September Order absolved him of the responsibility to keep the escrowed funds in which the OBA asserted an interest separate.

Under the second prong, the Committee affirmed the Hearing Panel’s finding that Mr. Williams had a knowing state of mind with respect to two of the four payments he made from the escrow account, justifying the presumptive baseline sanction of suspension under ABA Standard 4.13. See, e.g. *Bruzga’s Case*, 162 N.H. 52, 59 (2011) (“The mental state may be one of intent, knowledge or negligence.”) The Committee found, based upon the record, that Mr. Williams should have known that there was a dispute as to OBA’s entitlement to the escrowed funds following the filing of the August 25, 2010 pleading by the OBA, and that such constructive knowledge was sufficient under ABA Standard 4.13 to apply the presumptive sanction of suspension to the August 31, 2010 and January 6, 2011 payments from the escrow accounts, which the Committee found to be in violation of Rule 1.15(g). *In Re Wyatt’s Case*, 159 N.H. 285, 307 (2009). The Committee further found that although Mr. Williams may have honestly forgotten about his obligation to pay Mr. Callen due to the passage of time, the “should have known” standard incorporated in ABA Standard 4.13 supports the baseline sanction of

suspension. Accordingly, the Committee agreed with the Hearing Panel that Mr. Williams' mental state justified the use of suspension as the baseline sanction.

The third prong speaks to potential or actual injury caused by the misconduct. "Injury," as defined by the ABA Standards, includes "harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct." *Conner's Case*, 158 N.H. at 304. The Committee accepted the Hearing Panel's finding that Mr. Williams's actions caused actual injury to the OBA, a finding supported by evidence that the OBA incurred litigation expenses to recoup the funds from Mr. Williams. The Committee also accepted the Hearing Panel's finding that Mr. Williams's actions caused injury to the public, which is entitled to have confidence in a lawyer's fiduciary obligation to protect the property in which others have a claimed interest. *See ABA Standards, Sec. II* ("[m]embers of the public are entitled to be able to trust lawyers to protect their property...."). Again, the existence of actual injury to the OBA and the public justified use of suspension as the baseline sanction.

Once the Committee determined that the baseline sanction for Mr. Williams's misconduct is suspension, the Committee considered the existence of the any aggravating or mitigating factors and whether such factors should affect the sanction recommended. *Conner's Case*, 158 N.H. at 303. The Committee identified the following aggravating factors: (1) a selfish but not dishonest motive because Mr. Williams paid himself over \$23,000.00 in legal fees, in violation of Rule 1.15(g) and (2) Mr. Williams's substantial experience in the practice of law. The Committee also found that Mr. Williams also had five instances of misconduct involving Rule 1.15 arising from his appointment as an escrow agent in litigation in which he was involved. These aggravating factors would support imposition of the sanction of suspension. *See Douglas' Case*, 147 N.H. at 544. The Committee found that the following mitigating factors were present, and were significant: (1) no relevant prior disciplinary history and (2) absence of a dishonest motive. *See, e.g. Welts' Case*, 136 N.H. at 593. The Hearing Panel found that Mr. Williams had a good character and reputation, that he made good faith efforts to make restitution or otherwise rectify the consequences of his misconduct, and that he cooperated with the disciplinary authorities, factual findings which the ADO did not challenge and which the Committee found to be supported by the record. Although the Committee did find two additional Rule violations, it agreed with the ADO the two additional Rule violations should not alter the baseline sanction of suspension, and it agreed with the Hearing Panel that the mitigating factors outweighed the aggravating factors to the extent that a downward departure from the presumptive sanction of suspension was warranted. Accordingly, the Committee recommended that Mr. Williams be given a Public Censure for his violations of Rule 1.15(f) and (g).

The Committee's recommended sanction is in accord with the purposes of attorney discipline. *See, e.g., Conner's Case*, 158 N.H. at 303-305; *Richmond's Case*, 152 N.H. at 159-60 (2005). This sanction is also in accord with the *ABA Standards for Imposing Lawyer Sanctions* (2005). The purpose of the Court's disciplinary power is "not to inflict punishment but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal

profession, and prevent similar conduct in the future.” *Grew’s Case*, 156 N.H. at 366 (2007) (quoting *Coddington’s Case*, 155 N.H. at 68)).

IV. COSTS

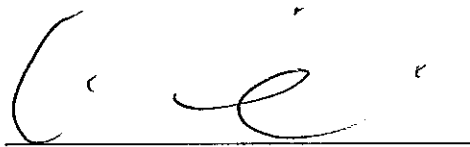
Mr. Williams shall be responsible for the expenses incurred by the Committee in the investigation and enforcement of this disciplinary matter. *See* Sup. Ct. R. 37(19)(b). Costs can include, but are not limited to: copying and costs associated with the publication of the censure, transcripts, conference calls and outside copying. The assessment of costs shall become final unless Mr. Williams 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 disagreement, or enforce the assessment of costs 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 of costs 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). Mr. Williams shall be responsible for any costs incurred as a result of the Attorney Discipline Office’s collection efforts.

V. CONCLUSION

For all of the above reasons, the Professional Conduct Committee issues a Public Censure to Finis E. Williams, III for violating N.H. Rules of Professional Conduct 1.15(f) and 1.15(g).

March ²⁰__, 2014



David M. Rothstein
Chair

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