

New Hampshire Supreme Court  
**Professional Conduct Committee**

*a committee of the attorney discipline system*

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***Burke, Michael M. advs. Attorney Discipline Office #11-060***

**RECOMMENDATION OF EIGHTEEN-MONTH SUSPENSION**

On January 20, 2015, the Professional Conduct Committee (“PCC”) deliberated the Stipulation as to Facts, Violations and Sanction, as well as the Agreement to Pay Costs of Disciplinary Matter. Members present included David M. Rothstein, Chair, Elaine Holden, Vice Chair, Susan R. Chollet, Richard H. Darling, Georges J. Roy, David W. Ruoff, Richard D. Sager and Martha Van Oot. Heather E. Krans, Vice Chair, Peter G. Beeson, and Margaret R. Kerouac were absent from the meeting, and Mona T. Movafaghi was not present for the deliberation on this matter.

Having reviewed the Record, the Professional Conduct Committee voted to accept the facts as stipulated, by clear and convincing evidence. The Committee also voted to accept the Rule violations as stipulated.

**I. FINDINGS OF FACT**

The Professional Conduct Committee has determined that the Record supports the following factual findings of the Hearing Panel by clear and convincing evidence:

1. Mr. Burke is an attorney licensed to practice law in New Hampshire. He was admitted to practice in 1979. Mr. Burke was admitted to practice law in Maine on October 17, 1996. He is currently on summary suspension in Maine due to a failure to pay bar dues.
2. Mr. Burke has no previous disciplinary history.

3. At all times material to this proceeding, Mr. Burke was a partner at the Law Office of Gould & Burke, PLLC, (“G & B” or “the firm”) which was located at 177 Waukegan Street, in Meredith, New Hampshire. Mr. Burke most recently operated his law office as Law Office of Michael Burke, P.O. Box 2906, South Portland, Maine 04116-2906.
4. By letter dated June 10, 2011, Gregory T. Uliasz, Esquire submitted a letter of referral concerning the conduct of Michael E. Gould, Esquire, and Michael M. Burke, Esquire, with regard to their conduct when they were practicing as law partners at G & B. Mr. Uliasz was serving as attorney for Steven M. Notinger, Chapter 7 Bankruptcy Trustee.
5. The conduct giving rise to the rule violations referenced below stems from Mr. Burke’s representation of Scott D. Farah and his mortgage brokerage business, Financial Resources Management, Inc. (“FRM”), as well as his representation of lenders in real estate closings.

**A. Background Facts**

6. In 2002, while Mr. Burke was a solo practitioner in Laconia, New Hampshire, he began to have discussions with Mr. Gould about merging their practices. Mr. Gould had a business opportunity in mind after meeting Mr. Farah, the owner and principal of FRM. FRM was located in Meredith, New Hampshire.
7. Mr. Farah was in the mortgage brokering business. Although FRM engaged in traditional brokering services, utilizing large lenders such as Countrywide, the portion of FRM’s business that is most relevant to this disciplinary investigation was its brokering of “hard money” deals.
8. FRM would market to and solicit private lenders by sending mass mailings to individual lenders. These mailings would identify specific deals on which lenders could lend money. Lenders would then lend money, usually at an interest rate of 12-14%, to borrowers for various residential and commercial projects.
9. Mr. Farah had approached Mr. Gould and asked if he would be interested in handling all of Mr. Farah’s residential mortgages because his previous attorney was retiring. Mr. Gould approached Mr. Burke because the volume of loans brokered by FRM was quite large, and Mr. Gould was not sure he could manage that volume of closings. Mr. Burke had a good deal of real estate experience and after further discussion, he and Mr. Gould eventually agreed to become partners and agreed to represent Mr. Farah and FRM.
10. Mr. Burke and Mr. Gould met with Mr. Farah and worked out an arrangement for handling the closings on deals brokered by FRM. In early 2003, G & B entered

into a lease and relocated to a floor of the same building out of which FRM operated in Meredith.

11. Eventually, Mr. Burke and Mr. Gould agreed in general terms that Mr. Burke would supervise real estate closings and Mr. Gould would focus on litigation. Each attorney also handled his own case load. For example, Mr. Burke continued to handle bankruptcy matters.
12. By the end of 2003, Mr. Burke was the “de facto” real estate department of the firm and assumed primary responsibility for the loan closings brokered by FRM. He had primary supervisory responsibility for the paralegals and for all real estate transactions.
13. From 2003 through the summer of 2005, G & B continued to close only residential loans using institutional lenders for consumers at the request of Mr. Farah as the loan broker. Mr. Burke was actively involved in all real estate closings, including maintaining the firm’s “Title Express” software, until late summer of 2005, when he felt that the staff had been sufficiently well-trained for him to become more of a “trouble shooter.” He continued to supervise the paralegals, and review title reports and settlement statements prior to closing, but he no longer opened files or “actively handled” each file as if it were his primary assignment.
14. By the fall of 2005, FRM’s focus began to change and so did the work that the firm did on behalf of FRM. Mr. Farah began to focus heavily on “private money” (or “hard money”) lending because the subprime loan market had slowed significantly. Mr. Farah wanted to match builders with private money lenders, and he asked if G & B could conduct the closings for the private money loans he was brokering. G & B agreed to do this work. Again, Mr. Burke was primarily responsible for the supervision of paralegals and staff as it pertained to private money loans.
15. The firm would research title, review title abstracts and reports, draft loan documents, prepare title insurance commitments, and work with Mr. Farah and his brokers to set up settlement statements. G & B served as closing agent for these loans, representing the lender-investors at closing. G & B was paid a document preparation fee (usually in the range of \$500 to \$1,000) and a closing fee (usually in the range of \$250 to \$500). The firm would also retain the commission on the title insurance fee because G & B was a title insurance agent for Old Republic National Title Insurance Company (“Old Republic”). These funds were paid by the borrowers at closing.
16. By the end of 2005, G & B employed approximately four staff, two of whom were paralegals involved in handling a high volume of real estate closings. Mr.

Burke estimates that at various periods during 2005 – 2009, G & B closed as many as 25 loans per month. At that time, FRM's loan closings and related matters represented about one-half of G & B's practice.

17. It was only after G & B agreed to undertake the handling of private money loans that Mr. Burke and Mr. Gould had any dealings with Donald Dodge and C, L, and M, Inc. ("CLM"). CLM was the loan servicer for the private money loans. Mr. Farah had a decades-long relationship with Mr. Dodge, the principal of CLM. G & B did not represent CLM except as it pertained to the closing of private money loan transactions. CLM, as agent for the lender-investors, hired G & B to close the loans. CLM's agency agreement allowed it to act on the lenders behalf. G & B was in the practice of primarily contacting the lenders through CLM, though the Firm did send an introductory letter to lender-investors informing them that G & B would represent them for purposes of closing their loans.
18. Mr. Burke was also paid \$500 a week, from approximately 2007 to 2009, to provide general advice to FRM for out-of-state transactions and to make himself available to Scott Farah for consultation one hour per day to discuss such issues.
19. Two real estate projects give rise to this disciplinary matter. In one project, Mr. Burke's partner, Mr. Gould, served as trustee of the Good Earth Revocable Trust of 2006 (the "Trust"), which was the borrower in what the firm called the "Good Earth" transaction. Mr. Burke notarized some of the loan documents for this transaction. As discussed further herein, Mr. Gould had an unwaivable conflict of interest in serving as trustee for the borrower while representing lenders at closing. Moreover, Good Earth loans were closed without approval from the New Hampshire Attorney General's office ("AG"), and mortgages were never recorded (even recorded mortgages would have had no legal effect, because without AG approvals, the units did not legally exist).
20. The other project was the White Birches condominium project in Chichester, New Hampshire ("Chichester"), in which G & B represented lender-investors at closings for private money construction loans, most of which closed in 2007. Mr. Burke supervised the work of G & B's paralegals with respect to these loan closings. Mr. Burke also issued title insurance as an agent for Old Republic with respect to these loans. The lender-investors were provided with mortgages to 17 condominium units. Although these mortgages were recorded after closing, a proper title search would have revealed that the declaration and floor plans for the project were not recorded, and as such, the 17 condominium units did not legally exist.

### **The Good Earth Project**

21. Mr. Gould drafted the Good Earth Trust document for a client of the firm named Gary Coyne (now deceased). It was the only time Mr. Gould served as trustee for borrowers in any closings conducted by G & B. Acting on behalf of the Trust as the borrower, Mr. Gould, as trustee, executed the closing documents to purchase the land the Trust was to develop. The Trust documents were executed on October 12, 2006.
22. The paralegals doing work on the Good Earth project dealt primarily with Mr. Gould. Nonetheless, Mr. Burke did know that Mr. Gould was trustee for the borrower because he notarized some of the loan documents for the Good Earth project. He was thus aware that his partner was serving as trustee for the borrowers while their law firm also represented lenders in the same transaction. Mr. Burke recalls that upon speaking with Mr. Gould about his role as trustee, Mr. Gould described his role as “merely titular,” and stated that as soon as the project had received approval from the AG’s office, which Mr. Gould believed was imminent, he would resign as trustee.
23. Between December 2006 and July 2007, G & B, as closing agent, with Mr. Gould overseeing the drafting of documents, drafted all of the loan documents for and, representing the lender-investors, closed 31 loans for the Good Earth project. Lender-investors loaned a total of \$3,899,000.00 to the Good Earth Trust.
24. Mr. Burke notarized some of the loan documents requiring notarization. All 31 loans closed even though no AG approval existed at the time of closing. Mr. Burke knew or should have known that no AG approval existed at the time of closing. Mr. Burke also knew or should have known that no Condominium Declarations or floor plans had been recorded at the time of closing. As such, the loans were not secured by anything. Moreover, no mortgage was ever recorded for any of the 31 transactions.
25. From these 31 transactions, the settlement statements show that G & B was paid approximately \$30,500 in total document preparation and closing fees. The Firm also received a total of \$3,399.46 in recording fees for mortgages never recorded, and total commissions of \$6,253.70 for title insurance that was never issued.
26. Title policies were never issued and no funds were remitted to Old Republic (a title search would have been futile; no “units” existed on which to run a search). Although Mr. Burke is no longer in possession of any of the Good Earth files, the ADO’s review of such files shows that the original checks written out to Old Republic for premiums remain in the G & B files.

27. In the months following the last closing in the Good Earth project, Mr. Burke followed up with Mr. Gould regarding whether AG approval was forthcoming. Based on representations from Mr. Farah, Mr. Gould told Mr. Burke that they were forthcoming.
28. Nonetheless, the AG approvals never materialized. Mr. Burke recognizes that as Mr. Gould's partner, he should have demanded that Mr. Gould resign as trustee of the Good Earth Trust due to an unwaivable conflict of interest.
29. Mr. Burke further recognizes that he should not have, in the first instance, allowed any closings to occur in the absence of AG approval. Further, once the loans closed, and the AG approval was not forthcoming, he admits that he should have acted decisively to disclose the deficiencies in the transactions to the lenders and borrowers and taken remedial steps to disclose the conflict Mr. Gould had in connection with the transactions. Such a disclosure should also have advised the parties of their need to obtain their own counsel to explore means of correcting the deficiencies or unwinding the transaction and making the parties as whole as possible.
30. Mr. Gould eventually resigned as trustee on October 22, 2009.
31. A few weeks thereafter, Mr. Farah's fraudulent "Ponzi" scheme came to light, and the issue regarding what remedial actions to take became moot to the extent that the New Hampshire Banking Department and a representative from the New Hampshire AG's office seized all of G & B's files and hard drives and the firm ceased any representation of Mr. Farah, FRM, or lenders. *See infra*, ¶¶ 49-50.
32. Mr. Burke had no knowledge of the "Ponzi" scheme perpetrated by Scott Farah and Donald Dodge, both of whom are now in federal prison.
33. G & B had no involvement whatsoever with lender-investors' funds because the loans were "net funded," meaning that once they closed, and G & B received its closing fees, the net amount of the loan was held solely by CLM, which exercised control over it in making disbursements. Further, G & B was not involved in loan servicing.
34. It is unknown how much the lenders in the Good Earth transactions ultimately received in loan payments because G & B had no involvement with payments made to lenders under the terms of the loans. Upon closing, G & B retained its document preparation fees, title insurance commissions, and recording fees as set forth in the settlement statements, and the rest of the loan funds were remitted to CLM, the loan servicer. Payments to lender-investors were effectuated solely by CLM.

### The Chichester Project

35. On October 13, 2005, the AG conditionally approved registration of 17 units for a project known as "The White Birches of Chichester, a Condominium." A Certification of Registration was issued the same day. Beginning in February 2007, G & B acted as the attorneys for the lender-investors on this project.
36. Between March 9, 2007 and May 1, 2009, G & B, as closing agent, with Mr. Burke overseeing the closings, drafted the documents for and closed 30 loans, including loan assignments and loan modifications, for the Chichester project. The majority of the loans closed on March 9, 2007.
37. At the time of the closings for the Chichester condominium project, the condominium declaration had not been recorded as required by RSA 356-B:7. Also, G & B failed to recognize that the condominium floor plans were not on record. As such, the 17 condominium units did not legally exist.
38. G & B drafted all of the loan documents and represented the lender-investors at closing. Ultimately, approximately sixteen lender-investors loaned a total of approximately \$1,149,000.00 to the Chichester project. Mortgages were recorded for each unit despite the legal defects in title.
39. The settlement statements for the 30 transactions reflect that G & B was paid a total of approximately \$21,110.00 for legal fees associated with document preparation and closing costs. G & B also collected a total of approximately \$1,702.27 in recording fees for the defective transactions.
40. A review of G & B's files on the Chichester project reveals other deficiencies with respect to some transactions. In at least one case, a purported first mortgage was not in fact a first mortgage. For example, one investor loaned \$49,000 and was provided with a recorded mortgage for "Unit 1." It was later determined that there were senior mortgages, from prior owners, which had not been discharged. Further, several of the mortgages were assigned to new lender-investors without a determination of the deficiencies in title.
41. G & B was also an agent of Old Republic authorized to issue title insurance policies in connection with the transactions. Mr. Burke signed the policies as the "Authorized Officer or Licensed Agent." While the majority of the loans closed on March 9, 2007, the title insurance policies did not issue until months later; in several cases, as late as October 2007. G & B received commissions and premiums for title insurance totaling approximately \$2,813.00 without completing a proper title search, which would have revealed that the condominium units did not legally exist.

42. Like those in the Good Earth project, the Chichester loans were “net funded,” meaning that once the loan closed, and G & B retained its legal fees, document preparation fees, and title insurance commission as set forth in the settlement statements, the net amount of the loan was held by CLM, which exercised control over making disbursements. G & B was not involved in the loan servicing. Payments to the lender-investors were effectuated by the loan servicer, CLM.
43. At the time G & B closed the Chichester loans, it was Mr. Burke’s understanding that the condominium was properly created and approved and that the necessary documentation was recorded in the Merrimack County Registry of Deeds. Mr. Burke was negligent in that, although title searches were performed, Mr. Burke failed to recognize that the necessary documentation was not recorded in the Merrimack County Registry of Deeds. Mr. Burke was also negligent because G & B did not verify that the condominium declaration and floor plans were recorded prior to closing the loans for the project.
44. Mr. Burke allowed mortgages to be recorded in the Registry of Deeds for units that did not legally exist.
45. Mr. Burke’s conduct was negligent in that he should have known of the deficiencies in title which prevented the lender-investors’ security interest from properly attaching.
46. Mr. Burke also knowingly allowed his paralegals to complete the majority of the work on the Chichester project, including closing the loans and recording the mortgages, with inadequate supervision from him. As a result, the loans were closed and recorded with the deficiency of title present. Mr. Burke should have known that the necessary documentation was not recorded in the Registry sufficient to allow the creation of a lienable interest, prior to recording the mortgages and also prior to issuing the title insurance, and he did not take steps to insure that his paralegals’ work was accurate.
47. Although defective for the reasons discussed herein, the loans closed by G & B for the Good Earth and Chichester projects, and the files maintained by the firm for those loans, do not contain any “red flags” or irregularities indicative of participation in a scheme to defraud investors.

#### **The Collapse of FRM and CLM and the Aftermath**

48. On November 5, 2009, Mr. Farah confessed to Mr. Gould and Mr. Burke that FRM was “out of money” and that he and Mr. Dodge had perpetrated a Ponzi scheme. Upon learning that FRM and CLM had engaged in criminal activity, Mr. Gould and Mr. Burke told Mr. Farah that the firm could no longer represent FRM

and that Mr. Farah needed a criminal defense attorney. Mr. Gould and Mr. Burke also reached out to FRM's lawyer who represented the company before the Banking Commission and, working together, they made contact with the Attorney General's office and representatives from the New Hampshire Banking Department.

49. On November 9, 2009, representatives from the Banking Department and the AG's office, as well as other law enforcement officials, appeared at the FRM offices and seized all of the contents of FRM and CLM.
50. FRM and CLM went into involuntary bankruptcy on November 20, 2009. Thereafter, Mr. Gould and Mr. Burke's counsel agreed with the U.S. Attorney's Office (USAO), the AG, and the Chapter 7 Bankruptcy Trustee to place all of G&B's files in storage. Mr. Gould and Mr. Burke were not allowed access to their files except through counsel.
51. Mr. Burke, along with Mr. Gould, retained criminal defense counsel, as they became the subjects of a criminal investigation by the USAO. The USAO conducted an investigation. Neither Mr. Gould nor Mr. Burke was charged with any crime. Donald Dodge and Scott Farah are currently serving, respectively, six and a half and fifteen year terms in federal prison.
52. Mr. Burke and Mr. Gould, and G&B, were also sued for malpractice by lender-investors in approximately 75 separate matters arising out of their work as closing agents. Many of these lawsuits were related to the Good Earth transactions. Lawsuits and declaratory judgment actions were also brought with respect to the Chichester transactions. Mr. Burke was sued for legal malpractice, as well as negligent and fraudulent misrepresentation.
53. Approximately 73 of those matters were settled in an omnibus mediation in the late spring or early summer of 2011. Mr. Burke and Mr. Gould, through their counsel, negotiated with the attorney for the Trustee in Bankruptcy to carve out \$1.6 million of their total \$2 million in malpractice coverage to use for the mediated settlements. The remaining \$400,000 stayed in the bankruptcy estate for creditors' claims. There are no currently pending malpractice claims against Mr. Burke or his firm. None of the matters went to trial.
54. Mr. Burke and Mr. Gould turned over all funds in their real estate trust account that to their knowledge related to FRM/CLM, pursuant to a "turnover" order of the Bankruptcy Court dated February 17, 2010. The funds, totaling \$53,209.64, were made part of the bankruptcy estate in an attempt to satisfy creditors of CLM.
55. As of May 2014, there remained some funds in G&B's real estate trust account. In May 2013, Mr. Burke, after having attempted to reconcile the G&B real estate

trust account, closed the account and wrote a check to Mr. Gould for the entire balance, requesting that Mr. Gould determine how much of those funds related to his clients, and authorizing Mr. Gould to work with the ADO to determine the appropriate further actions. Mr. Gould deposited the total amount of \$25,470.08 into an account in his name, where it remained untouched and safeguarded for the next year.

56. Based on correspondence from Mr. Burke to the ADO, received in May 2014, it appeared that approximately \$4,471.05 in the trust account represented title insurance premiums for unissued title insurance policies relating to the Good Earth transactions. Mr. Burke and Mr. Gould could not determine with certainty, and lacked documentation to prove, that the remaining \$20,999.03 was unrelated to loans closed on behalf of CLM. For that reason, on May 27, 2014, Mr. Gould voluntarily turned over the entire amount, \$25,470.08, to the Trustee in Bankruptcy pursuant to the Bankruptcy Court's turnover Order dated February 17, 2010. Mr. Burke agreed with this course of action.
57. Throughout the ADO's investigation, Mr. Burke has been forthcoming and cooperative.
58. No client of G&B, nor any party to any of the closings conducted by G&B, submitted grievances to the ADO. As noted above, this matter came to the ADO's attention via the Trustee in Bankruptcy.

Stipulation at ¶¶ 1-58.

## **II. RULINGS OF LAW**

The Professional Conduct Committee concludes that there is clear and convincing evidence that Michael M. Burke has violated the following Rules of Professional Conduct by clear and convincing evidence:

### **Rules 1.1 and 1.3: Competence and Diligence**

59. Mr. Burke owed a duty to the lender-investors to provide competent representation, including performance of the techniques of practice with skill, proper preparation, and attention to details necessary to assure matters were undertaken with no avoidable harm to his clients.
60. Mr. Burke had a duty to act with reasonable promptness and diligence on behalf of the lender-investors.

61. Mr. Burke failed to provide competent and diligent representation to the lender-investors in the Good Earth transactions, by:
- A. Allowing all 31 transactions to close in the absence of any declarations and floor plans being recorded with the county registry of deeds and in the absence of any approvals for the condominium development from the Attorney General being recorded with the county registry of deeds;
  - B. Failing to record any mortgages for the 31 Good Earth transactions;
  - C. Allowing the Good Earth transactions to languish with no AG approval and no recorded mortgages for, in some cases, over two and a half years, even where such failure was not purposeful;
  - D. Failing to attend to details and schedules necessary to assure that the Good Earth transactions avoided harm to the clients' interests;
  - E. Failing to undertake actions on the lender-investors' behalf in a timely and effective manner; and
  - F. Failing to appreciate, from the outset of the Good Earth transactions, that his partner Mr. Gould had an unwaivable conflict of interest in serving as both trustee for the borrowers (in any capacity, "nominal" or not) and as attorney for the lenders at closing, and failing thereafter to require that Mr. Gould resign as trustee to take remedial steps to avoid harm to his clients.
62. Mr. Burke failed to provide competent and diligent representation to lender-investors in the Chichester transactions, by:
- A. Failing to verify that the necessary declaration and floor plans were on record prior to closing construction loans for the condominium development;
  - B. Failing to adequately conduct or review a competent title search in order to assess any deficiencies in title; and
  - C. Recording or allowing mortgages to be recorded for condominium units that did not legally exist.
63. Mr. Burke's conduct, as aforesaid, constitutes clear and convincing evidence of a violation of Rules 1.1 and 1.3.

**Rule 1.4: Client Communication**

64. Mr. Burke owed the lender-investors a duty to keep them reasonably informed about the status of their matters and to promptly comply with reasonable requests for information. N.H. R. Prof. Cond. 1.4(a).
65. Mr. Burke breached that duty:

- A. In the Good Earth transactions, by:
- 1) Failing to inform the lenders, whom he represented at closing, that Mr. Gould was trustee for the borrowers, and, to the extent he or Mr. Gould believed this position was a waivable conflict, failing to obtain informed consent from the parties affected;
  - 2) Although he kept the lenders' agent, CLM, informed as to the status of the loans, failing to inform the parties to the 31 Good Earth transactions that at the time of closing, no AG approvals existed for the project, no declarations or floor plans had been filed, and thus mortgages, even if recorded, would attach to nothing;
  - 3) Failing to inform the parties to the 31 Good Earth transactions, at any point after closing, and in particular the lenders, whose loans were unsecured, that no AG approvals had been received, no condominium plans or declarations had been filed with the AG's office, and no mortgages had been recorded; and
  - 4) Once it was clear no AG approvals were forthcoming, failing to require that Mr. Gould resign as trustee of the Good Earth Trust, inform the parties to the transaction of such resignation and reason for such resignation, and undertake steps to unwind the transactions including, at a minimum, informing all parties that no condominium units existed and no interests were secured.
- B. In the Chichester transactions, by failing to inform G&B's clients, the lender-investors, that the loans could not be closed because there were legal deficiencies in title.

66. Under the foregoing circumstances, there is clear and convincing evidence of a violation of Rule 1.4.

**Rule 1.7: Conflicts of Interest**

67. Mr. Burke owed a duty to his clients, the lender-investors in the Good Earth transactions, not to represent them under such circumstances as to produce a significant risk that Mr. Burke's representation of them would be materially limited by Mr. Burke's responsibilities to another client.
68. Mr. Burke owed a duty to the lender-investor clients to not represent them where such representation would be directly adverse to another client.
69. Mr. Burke breached those duties when his law partner served as trustee for the borrower in Good Earth while the firm represented the lenders in the same set of transactions.

70. Mr. Burke breached these duties because once mortgages remained unrecorded, an adverse relationship developed between and among G&B, the Good Earth Trust, and CLM.
71. Mr. Burke's aforementioned conduct constitutes clear and convincing evidence of a violation of Rule of Professional Conduct 1.7.

**Rule 5.3: Responsibilities Regarding Nonlawyer Assistants**

72. Mr. Burke was the supervisor of the firm's real estate department.
73. Mr. Burke had a duty under Rule 5.3 to make reasonable efforts to ensure that his firm had in effect measures giving reasonable assurance that the conduct of its non-lawyer staff was compatible with Mr. Burke's professional obligations.
74. Mr. Burke had a duty under Rule 5.3, as a lawyer with direct supervisory authority over the paralegals and legal assistants in the firm, to make reasonable efforts to ensure that these non-lawyers' conduct was compatible with the professional obligations of Mr. Burke. In short, he had a duty to adequately supervise all non-lawyers at his firm.
75. Mr. Burke breached his duties under Rule 5.3:
  - A. In the Good Earth transactions, by:
    - 1) Failing to educate or properly supervise G&B's paralegals and legal assistants by allowing them and/or instructing them to process and close 31 loans for a condominium development that lacked approvals from the Attorney General;
    - 2) Failing to educate or properly supervise G&B's paralegals and legal assistants so that 31 mortgages were never recorded and such recording fees remained in the files, in some cases, for over two and half years; and
    - 3) Failing to educate or properly supervise G&B paralegals and legal assistants so that title fees remained in Good Earth files for years and title insurance never issued.
  - B. In the Chichester transactions, by:
    - 1) Allowing his staff to do the bulk of the work with respect to closing the Chichester loans with inadequate supervision from him;
    - 2) Failing to educate or properly supervise his paralegals and legal assistants so that they would identify the fact that necessary declaration and floor plans for the Chichester condominium project

were not recorded prior to closing the loans for the lender-investors; and

- 3) Failing to conduct an independent review of his paralegals' title search to ensure that deficiencies in the title were found.

76. Under these circumstances, there is clear and convincing evidence of a violation of Rule of Professional Conduct 5.3.

**Rule 8.4(c): Misrepresentation**

77. Rule 8.4(c) states as follows:

It is professional misconduct for a lawyer to:

- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

78. Mr. Burke violated Rule 8.4(c), as to the Good Earth transactions, by:

- A. Although he kept the lenders' agent, CLM, informed as to the status of the loans, failing to disclose to lender-investors, before allowing the transactions to close, the material fact that no AG approvals had been received, the mortgages could not attach to any interest, and thus their loans were unsecured. Such failure constituted a misrepresentation insofar as all lenders reasonably assumed their loans were secured by something in the absence of any communication from Mr. Burke stating otherwise;
- B. Failing to correct this misrepresentation in the years that followed; and
- C. Failing to disclose to borrowers, who had paid fees for title insurance and recording of mortgages, that mortgages were not in fact recorded and title insurance never issued, and failing to return the fees associated with this service to the borrowers.

79. Under these circumstances, there is clear and convincing evidence of a violation of Rule of Professional Conduct 8.4(c).

**Rule 8.4(a): General Rule**

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

### **III. ANALYSIS**

The purpose of the Court's disciplinary power "is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct

in the future.” *Conner’s Case*, 158 N.H. 299, 303 (2009). *The American Bar Association’s Standards for Imposing Lawyer Sanctions* state that the discipline to be imposed in a particular case “should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.” The Court has not adopted the *Standards*, but it does look to them for guidance. *Conner’s Case*, 158 N.H. at 303. The *Standards* set forth a four part analysis to be considered in imposing sanctions for lawyer misconduct: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 155 N.H. 613, 621 (2007)); *Standards*, §3.0.

The first three steps create a framework for characterizing the misconduct and determining the baseline sanction. *See Conner’s Case*, 158 N.H. at 303.

#### **Prong I: Duty Violated**

Mr. Burke stipulated, and the Committee concluded that he violated the duties of competence, diligence and avoidance of conflicts of interest owed to his clients; failed to properly supervise the non-lawyer assistants in his firm; and engaged in conduct involving misrepresentation. *See Standards* §§ 4.3, 4.4, 4.6 and 7.0.

#### **Prong II: Mental State: Intent/ Knowing or Negligent**

Mr. Burke stipulated, and the Committee concluded that Mr. Burke’s mental state was knowing with respect to the Good Earth transaction and negligent with respect to the Chichester transaction.

#### **Prong III: Injury or Potential Injury**

Mr. Burke stipulated, and the Committee concluded that he caused actual injury to clients, who likely would not have invested in the Good Earth project, whose loans were unsecured and who closed on those loans without accurate information, and who each paid between \$734.66 -\$1,404.66 for closing costs, document preparation, recording fees and title insurance without receiving the benefit of their bargain. Mr. Burke stipulated and the Committee

concluded that he caused actual injury to his clients in the Chichester matter, who each paid between \$1,231.50 - \$1,782.41 for closing costs, document preparation, recording fees and title insurance without receiving the benefit of their bargain.

Mr. Burke's violations of Rules 1.1, 1.3 and 1.4 implicate Section 4.4 of the *Standards*. Section 4.42 provides in pertinent part that suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

His violation of Rule 1.7 implicates Section 4.3 of the *Standards*. Section 4.32 provides that 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.

Mr. Burke's violation of Rule 5.3 implicates Section 7.0 of the *Standards*. Section 7.2 of the *Standards* provides that suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Finally, Mr. Burke's violation of Rule 8.4(c) implicates Section 4.62 of the *Standards*, which provides in pertinent part that suspension is generally appropriate when a lawyer knowingly deceives a client, and causes actual or potential injury to the client.

Mr. Burke stipulated and the Committee concluded that under these circumstances, the baseline sanction for Mr. Burke's conduct is suspension.

#### **Prong IV: Aggravating and Mitigating Factors**

In this case, there are three aggravating factors: Mr. Burke's substantial experience in the practice of law, his multiple offenses, and a selfish motive. *See Standards* §9.22. There are also several mitigating factors, including an absence of a prior disciplinary record, remorse, as well as a cooperative attitude during disciplinary proceedings and full and free disclosure to the ADO. In addition, Mr. Burke has made a good faith effort to rectify the consequences of his misconduct by turning over substantial monies related to FRM/CRM to the Trustee in Bankruptcy in 2010 and 2014. In addition, he has incurred other penalties and sanctions through the defense of the many malpractice actions brought against him.

Mr. Burke stipulated, and the Committee concluded that given the aggravating and mitigating factors, combined with the baseline sanction analysis, no upward or downward departure from the baseline sanction of suspension warranted. Mr. Burke stipulated, and the Committee concluded that an 18 month suspension from the practice of law is an appropriate sanction.

#### IV. SANCTION

Having made the aforementioned findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter is an 18-month suspension. 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; *Richmond's Case*, 152 N.H. 155, 159-60 (2005). This sanction is also in accord with the *ABA Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*"). 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. 361, 365 (2007) (quotation and citation omitted).

#### V. COSTS

The Committee accepts Mr. Burke's Agreement to Pay Costs with regard to the investigation and prosecution of this matter.

#### VI. CONCLUSION

For all of the above reasons, the Professional Conduct Committee Recommends an 18 month Suspension from the Practice of Law for violating Rules of Professional Conduct 1.1; 1.3; 1.4; 1.7; 5.3; 8.4(a) and 8.4(c).

March 5, 2015

  
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David M. Rothstein  
Chair

cc: Sara S. Greene, Disciplinary Counsel  
Elizabeth M. Murphy, Assistant Disciplinary Counsel  
Michael M. Burke, Esquire  
File