

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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

Stephanie C. Hausman, Esq., Chair
Caroline K. Leonard, Esq., Vice Chair
Katheen M. Ames, Vice Chair
Trudy Renfors, Administrative Assistant

Brannen, Barney L.

advs.

Attorney Discipline Office - #23-011

ORDER

A Stipulation as to Facts, Violations, and Sanction: Reprimand together with an Agreement to Pay Costs of Disciplinary Matter was filed on July 18, 2023.

The Committee has reviewed this Motion and have accepted it.

September 28, 2023

/s/ Stephanie C. Hausman
Stephanie C. Hausman
Chair

cc: Sara S. Greene, Disciplinary Counsel
Barney L. Brannen, Esq.

NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE

Brannen, Barney L.

advs.

Attorney Discipline Office

#23-011

STIPULATION AS TO FACTS, VIOLATIONS,
AND SANCTION: REPRIMAND

Respondent Barney L. Brannen, Esq., and the Attorney Discipline Office (ADO) stipulate as follows:

A. Facts

1. Mr. Brannen is an attorney licensed to practice law in New Hampshire. He was admitted to practice on June 1, 1992.
2. Mr. Brannen was also admitted to practice law in Washington on November 16, 1989 and in Vermont on October 13, 1992. He voluntarily resigned from the Washington Bar but is on active status for the Vermont Bar.
3. At all times material to this proceeding, Mr. Brannen practiced law at Brannen & Loftus, PLLC, 80 S. Main St., Ste. 101, Hanover, NH 03755.
4. Mr. Brannen does not have a previous disciplinary history.
5. This disciplinary matter was initiated by a self-report submitted by Mr. Brannen by letter dated April 12, 2023.

6. Mr. Brannen's self-report occurred in connection with a divorce action presently pending in the Lebanon Family Division, *In the Matter of Georgina Voegele and Jonathan Voegele*, Case No. 652-202-DM-00144, in which he represented the Respondent, Jonathan Voegele. Mr. Voegele is a New Hampshire attorney.
7. After receiving a largely unfavorable decision from the Lebanon Family Division, following a hearing on several pending motions, Mr. Brannen had a conversation with his client about potentially filing a motion for reconsideration as to certain issues. Because he was about to leave for vacation for approximately two weeks, Mr. Brannen advised his client that he would need to seek an extension of the 10-day deadline for filing a motion for reconsideration.
8. Mr. Voegele offered to prepare a draft of the motion for reconsideration. Given the time constraints and the fact that Mr. Voegele is a New Hampshire licensed attorney, Mr. Brannen agreed.
9. The Court granted the motion for an extension of the deadline (over objection of the opposing party), but as Mr. Brannen sought an extension only to March 24, 2023, just two (2) days after his scheduled return from vacation, Mr. Brannen did not leave himself sufficient time to prepare and file a motion for reconsideration (or, in this case, to edit his client's draft of the prospective motion). In retrospect, Mr. Brannen admits this was a mistake.

10. Mr. Brannen exchanged emails with his client during the week the motion for reconsideration was due, starting Monday, March 20, but he did not receive his client's draft until approximately 10 AM on Friday, March 24, the day the motion was due. At the time his client's draft came in, he was tied up in other meetings, and, though he had a law clerk reviewing the draft and communicating with the client, Mr. Brannen did not sit down to review the draft motion until 2 PM that day, only two (2) hours before it needed to be hand-delivered to the clerk's office for filing.
11. In retrospect, Mr. Brannen should have begun preparing his own draft of a motion as soon as he returned to the office on March 22 and/or should have filed a motion for an additional extension of the filing deadline.
12. When Mr. Brannen reviewed the draft motion prepared by his client, he noted that the draft motion not only adopted an argumentative style not consistent with his own writing, but also included statements regarding evidence and arguments which did not constitute appropriate grounds to support a motion for reconsideration pursuant to N.H. Cir. Ct. Fam. Div. R. Rule 1.26.F, and/or would not be properly admissible in a Court proceeding pursuant to certain statutes without a predicate finding by the Court regarding the propriety of taking evidence on statements made in the course of mediation. In addition, the draft motion suggested that Petitioner's counsel had made purposeful misstatements of fact, which suggestions Mr. Brannen did not believe could be supported.

13. Notwithstanding his significant misgivings, but in light of the very tight timeline for filing the motion for reconsideration, he signed the motion and directed his office staff to hand deliver it to the Court for filing that afternoon. Though portions of the motion for reconsideration contained the problematic portions noted herein, it also contained legitimate advocacy and argument regarding certain matters.
14. Opposing counsel filed an objection to the motion for reconsideration and requested sanctions.
15. The ADO requested confidential attorney-client communications between Mr. Brannen and his client, which were promptly provided. Those communications demonstrate that Mr. Brannen, shortly after filing the motion, remonstrated with his client, and urged the filing of an amended and corrected motion. His client refused to authorize such a filing. Mr. Brannen continued discussions with his client until it was evident that he could no longer represent him.
16. Mr. Brannen filed a motion to withdraw, which was granted on June 13, 2023. The Court denied the motion for reconsideration by Order dated June 12, 2023. The Court's Order did not address the request for sanction.
17. Mr. Brannen has apologized to opposing counsel, with whom he has had a collegial relationship of several years.

B. Disciplinary Rules Violated

18. The parties agree that Mr. Brannen's conduct in this case involves violations of the New Hampshire Rules of Professional Conduct, as follows:

Rule 1.2: Scope of Representation

19. The facts set forth at ¶¶ 1-18 above are incorporated by reference.
20. Rule 1.2 states in pertinent part as follows:
- (a) Subject to paragraphs (c), (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
21. Mr. Brannen violated Rule 1.2(a) in that he improperly "delegated" to the client a responsibility that should have been Mr. Brannen's as the attorney of record, and he failed to adequately consult with his client as the means by which the client's objectives should be pursued, by not having declined to file a pleading which contained representations that violated certain court rules and statutes, and suggested opposing counsel had misrepresented to the Court.

Rule 3.1: Meritorious Claims and Contentions

22. The facts set forth at ¶¶ 1-21 above are incorporated by reference.
23. Rule 3.1 states as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or

reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

24. Mr. Brannen violated Rule 3.1 by filing the motion to reconsider, which contained certain representations about statements made in mediation which violated N.H. RSA 458:15-c, RSA 461-A:7, RSA 328-C:9, and N.H. Evid. Rule 408, as well as certain representations that violated to N.H. Cir. Ct. Fam. Div. R. Rule 1.26.F. These portions of the motion to reconsider thus lacked a basis in law and fact that was not frivolous.

Rule 8.4(a): General Rule

25. Having found the foregoing violation, there is clear and convincing evidence that Mr. Brannen's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

C. Recommended Sanction

26. The Attorney Discipline Office and Mr. Brannen jointly agree that a reprimand is the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.
27. Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support this sanction.
28. 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).
29. Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner’s Case*, 158 N.H. at 303. The *Standards* set forth a four part analysis for courts to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 156 N.H. 613, 621 (2007)); *Standards* § 3.0.
30. 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”).
31. Under the first prong of the analysis, Mr. Brannen violated duties owed to his client. *See Standards* Sec. II (Theoretical Framework).

32. With respect to Mr. Brannen's mental state under the second prong of the sanction analysis, the parties agree that Mr. Brannen's mental state was a combination of negligent and knowing.
33. Rule 1.0(f) of the N.H.R. Prof. Conduct defines "knowingly" as "denot[ing] actual knowledge of the fact[s] in question. A person's knowledge may be inferred from circumstances." The *Standards* define "knowledge" as a "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *Standards*, Sec. III ("Definitions"). See also *In Re Wyatt's Case*, 159 N.H. 285, 307, 982 A.2d 396, 413 (2009) (discussing "knowing" misconduct and stating "[w]hat is relevant . . . is the volitional nature of the respondent's acts, and not the external pressures that could potentially have hindered his judgment.>").
34. In this case, Mr. Brannen found himself extremely pressed for time on a motion for reconsideration that had already been the subject of an extension (over objection). The client provided him the draft motion just hours before it was due. Nonetheless, Mr. Brannen admits that he did in fact review the draft motion, and in this sense he was aware of certain attendant circumstances, including the fact that certain statements in the draft were not appropriate, as described herein.
35. Mr. Brannen's conduct, however, is more properly characterized as negligent in that he was extremely rushed in attempting to meet a filing deadline, and in that rush he failed to heed that "circumstances exist or

that a certain result will follow.” *Standards*, Sec. III (“Definitions”).

Importantly, Mr. Brannen attempted to correct his misjudgment by filing a corrected motion with the Court. When his client refused this course of action, he moved to withdraw.

36. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Brannen’s misconduct.
37. Mr. Brannen’s conduct caused injury in that the representations about opposing counsel caused her stress, and required that she address certain matters within the objection to the motion to reconsider that were without merit. However, the court declined to impose any sanctions as requested by the opposing party.
38. The parties agree that the baseline sanction in this matter is a public censure, as Mr. Brannen’s state of mind was primarily negligent and did cause at least some cognizable injury. *See Standards* § 4.43.
39. Mr. Brannen’s 1.2 rule violation implicates Section 4.4 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is generally appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 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.

4.43 **Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.**

4.44 Admonition¹ is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

(emphasis added).

- 40. Mr. Brannen's conduct in this matter, when considered under *Standard* 4.43, would call for a baseline sanction of public censure.
- 41. Mr. Brannen's 3.1 rule violation implicates Section 6.2 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

¹ The term "admonition," as used in the *ABA Standards*, is analogous to a reprimand in New Hampshire. The term "reprimand," as used in the *ABA Standards*, is analogous to a public censure in New Hampshire.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

(emphasis added).

42. Mr. Brannen's conduct in this matter, when considered under *Standard* 6.23, would call for a baseline sanction of public censure.
43. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.
44. In this case there is only one aggravating factor present – substantial experience in the practice of law. *See Standards* § 9.22.
45. Mitigating factors include absence of a disciplinary history (Mr. Brannen has practiced law for over 30 years), absence of a dishonest or selfish motive, timely effort to rectify consequences of the misconduct, full and free disclosure to and cooperation with the ADO, character and reputation, and remorse. *See Standards* § 9.32. This Committee has noted that it considers a self-report to be highly mitigating, even though such mitigator is not listed in the *ABA Standards*. *See Fricano, Joseph C.*

adv. ADO - #17-038 and Chadwick, Roger C., Jr. adv. ADO - #17-044
(Order dated July 25, 2019).

46. The parties agree that given the baseline sanction, and consideration of aggravating and mitigating circumstances, a downward departure to a reprimand is appropriate.

D. Costs

47. Subject to the PCC's approval of this Stipulation, Mr. Brannen agrees to pay the costs incurred by the ADO in the investigation and enforcement of this disciplinary matter. *See* Supreme Court Rule 37(19). His agreement to pay the costs incurred by the ADO is the subject of a separate agreement signed by Mr. Brannen.

E. Effect of Stipulation

48. Mr. Brannen understands that this Stipulation represents a recommended disposition, and that the PCC may accept, reject, or conditionally accept the Stipulation pursuant to Rule 37A(III)(aa)(1).
49. Mr. Brannen acknowledges that the admissions of misconduct and the proposed disposition contained in this Stipulation are freely, knowingly, and voluntarily submitted; and that he is not entering this Stipulation as a result of any threats, coercion, or duress, or of any promises or inducements not set forth in the Stipulation
50. Mr. Brannen understands that he has a right to obtain counsel regarding this Stipulation and, that he is fully aware of the consequences of the Stipulation.

51. Mr. Brannen knowingly and intelligently waives his right to a hearing.

Respectfully submitted,

Dated: July 18, 2023



Barney L. Brannen, Esquire
Respondent

Dated: July 18 2023



Sara S. Greene, Esquire
Disciplinary Counsel