Dunn, William H. advs. Attorney Discipline Office - #13-006

REPRIMAND AND ORDER ON COSTS

On May 17, 2016, the Professional Conduct Committee (the "Committee") deliberated the Stipulation as to Facts, Violations and Sanction (the "Stipulation") and the Agreement to Pay Costs of Disciplinary Matter. Members present included David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Peter G. Beeson, Margaret R. Kerouac, Mona T. Movafaghi, Richard D. Sager, and Martha Van Oot. Susan R. Chollet, Richard H. Darling, Scott H. Harris, and Georges J. Roy were absent.

The Committee approved the facts as stipulated, by clear and convincing evidence. The Committee then approved the findings of violations of the New Hampshire Rules of Professional Conduct (the "Rules") as stipulated, and approved the agreement to reimburse the Committee for all costs of investigation and prosecution.

I. FINDINGS OF FACT

The following factual findings are supported by clear and convincing evidence:

1. Mr. Dunn is an attorney licensed to practice law in New Hampshire. He was admitted to practice in 1974.

2. Mr. Dunn was also admitted to practice law in Iowa (admitted June 17, 1966), but is currently on inactive status there.

3. Mr. Dunn has no disciplinary history.

4. By letter dated January 11, 2013, Cathy Carter filed a grievance with the Attorney Discipline Office ("ADO") based on Mr. Dunn's representation of the executor of her husband's estate and what she believed to be excessive fees charged by Mr. Dunn. The case was referred to Disciplinary Counsel on May 9, 2014.

5. Underlying litigation, including mediation efforts overseen by Attorney Phil McLaughlin, did not conclude until November 2015.

A. <u>Mr. Dunn's Representation of the Executor in the Donovan Estate.</u>

6. Timothy M. Donovan died on June 29, 2009, when his experimental glider crashed in Washington. Mr. Donovan's Will named Michael J. Slocum, CPA as Executor. *In re: Estate of Timothy M. Donovan*, Case No. 320-2009-ET-0183, 5th Circuit, Probate Division, Newport ("the Estate").

7. Mr. Slocum served as Executor from July 2009 to April 2013. He also served as Trustee of Mr. Donovan's revocable trust, which also fell under the supervision of the Probate Court. *In re: The Timothy M. Donovan Revocable Trust of 2001,* Case No. 320-2011-EQ-00160, 5th Circuit, Probate Division, Newport ("the Trust").

8. Mr. Dunn served as counsel to Mr. Slocum from approximately July 28, 2009 until April 2013. He and Mr. Slocum entered into a written fee agreement pursuant to which the executor/trustee agreed to pay, and Mr. Dunn agreed to charge $200/hour, a discount from Mr. Dunn's rate of $225/hour. During the period that Mr. Dunn represented Mr. Slocum, he employed as many as two associates (at the rate of $165/hour) and four other staff members.

9. On April 10, 2013, the Probate Court removed Mr. Slocum as Executor and Trustee, pursuant to RSA 553:10, and Attorney McLaughlin was appointed as Administrator. Mr. Dunn's representation ceased on that date.

B. <u>Mr. Dunn's tasks and billings.</u>

10. The Estate was large and in some respects complex. The total gross estate was $8,389,864, and after total claimed deductions, the taxable estate was $1,401,051. Debt obligations of the Estate exceeded $2,000,000, and monthly debt service was over $15,000 each month.

11. The Estate involved some unusual assets, including airplanes and closely held corporations. This resulted in a number of out-of-the-ordinary business transactions which Mr. Dunn oversaw in the course of handling the Estate, including selling seven aircraft, selling aircraft hangars and a factory (the collateral for the debts), working with counsel in Washington on a wrongful death lawsuit brought on behalf of Mr. Donovan's family, collecting life insurance, threatening a lawsuit against Mr. Donovan's former

employer, Corning, and obtaining a $950,000 settlement for the Estate, investigating a purchase and sale agreement for what turned out to be non-existent land in the Bahamas, vetting Mr. Donovan's two computers for information, settling a potentially fraudulent promissory note designed to evade taxes,[1] and preparing Federal Estate and Income Tax returns.[2]

12. The relationship between the Executor and the beneficiaries was contentious from the start, as evidenced by an unsuccessful Motion to Remove Executor filed within the first year of Mr. Slocum's service.

13. During the period of time that Mr. Dunn represented Mr. Slocum, Mr. Dunn prepared, and Mr. Slocum signed, four Accountings, as well as Amended Accountings. Those Accountings set forth, *inter alia*, the attorneys' fees for which Mr. Dunn sought approval. The invoices for his fees were prepared in accordance with his written fee agreement, and were approved for payment by the Executor.

14. In Mr. Dunn's judgment, the work he and his staff performed was necessary to comply with his duties to the Executor. In this regard, Mr. Dunn knew that the tasks and his performance would be subject to strict review by the beneficiaries, as turned out to be the case. Accordingly, he completed all tasks exhaustively, and recorded all the time he spent on the case.

15. Following his understanding of the practice of the attorneys involved in *In re: Estate of Rolfe*, 136 N.H. 294, 299 (1992), on the issue of probate fees, Mr. Dunn escrowed 40% of the fees received from the Executor to provide for possible reductions by the Probate Court.[3]

16. Mr. Donovan's siblings, through their attorney, objected to Mr. Slocum's fiduciary fees reflected in those Accountings, to the expert witness fees paid to Attorney Ruth Anselm for appearing in support of the Executor at the hearing on the failed attempt to remove him, and to Mr. Dunn's legal fees. Ms. Carter (Mr. Donovan's second wife and also a beneficiary) likewise objected to the legal and fiduciary fees.

C. <u>In hindsight, the billings were unreasonable in some respects, though the payments actually received by the Dunn Law Office, following the Court-ordered reductions and because of the amount Mr. Dunn kept in escrow, were not.</u>

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[1] This work was never disclosed to the Probate Court, and never billed.

[2] This involved complicated research and negotiation over the tax status of a common law marriage. The Estate ultimately saved taxes in an amount over $1,500,000.

[3] At the conclusion of the Donovan probate matters, the escrowed reserve was sufficient to cover all reductions in fees ordered by the Probate Court.

17. Circuit Court Probate Division Rule 88 provides that the fees of fiduciaries and attorneys "shall be subject to the approval of the Court." Attorneys' fees must be reasonable. In determining reasonableness, the Probate Court looks to the factors set forth in *Rolfe*, 136 at 299. The *Rolfe* factors are the same factors set forth in Rule 1.5 governing reasonableness of fees.

18. In orders adjudicating the objections of the beneficiaries to Mr. Dunn's fees as set forth in the various Accountings, the Probate Court reduced Mr. Dunn's fees by about of 29%. The largest reduction in fees, of 42%, was from the First Accounting.[4]

19. Mr. Dunn admits that, in hindsight, the totality of the fees submitted, and some of the aspects thereof, were unreasonable and therefore violated Rule 1.5 in the following respects:

    (a) Mr. Dunn originally billed $1400 for time incurred by himself and his associate to travel from Claremont to Concord on March 17, 2011 to observe oral argument before the Supreme Court, by counsel for Cathy Carter, on the issue of ademption.[5] In an Amended Accounting, Mr. Dunn reduced the billing to one attorney. This was a disputed issue as between Ms. Carter and the Donovan children. Mr. Dunn believed it was important to attend the oral argument, as the positions taken by Ms. Carter's counsel could affect the tax liability of the Estate, and Mr. Dunn's negotiations with Corning. The Probate Court found, however, that Mr. Dunn could have viewed the oral argument via the Supreme Court's webcast.

    (b) Mr. Dunn charged attorney rates for non-professional tasks performed by an associate that could have been accomplished by Mr. Dunn's administrative staff, or by hiring a non-lawyer at a reasonable hourly rate. Examples of these efforts include: billing one hour on July 12, 2009 for Mr. Dunn to "go through airplane-related items at hangar;" Mr. Dunn's associate billing .75 hours on December 2, 2009 to "attempt to locate Jayco camper key;" Mr. Dunn billing .2 hours for obtaining a VIN number for a 1995 Toyota on December 30, 2009; billing 3.75 attorney hours to check on and duplicate an airplane key, including efforts to locate the key at the decedent's hangar, in August of 2010; billing .9 hours of lawyer time ($155) on April 4, 2011 to take photos of a trailer and "missing rusty

[4] The reduction included the Court-ordered elimination of payment to Attorney Anselm -- $5,000 -- for the Removal hearing (despite the Executor, and Mr. Dunn on his behalf, prevailing in the matter). $11,000 of the reduction was for work insisted upon by Ms. Carter – the initial work up of the personal injury case. Additional amounts included the complete elimination of fees for professional services rendered to a business owned by Mr. Donovan's Estate, X-Ray 8, LLC, in the management and termination of a lease with Corning. These reductions were ordered without a hearing afforded to Mr. Dunn by the Probate Court.

[5] Ademption concerns the consequences of a testamentary gift when the designated asset no longer exists in the testator's estate at the time of death

pins" and send them to wrongful death counsel in Washington.

(c) Mr. Dunn failed in several instances to describe his work with sufficient detail so as to enable the beneficiaries, and ultimately the Probate Court, to determine whether his work was necessary and appropriate and/or whether it duplicated the services of other professionals retained by Mr. Dunn or Mr. Slocum. For example:

i. Mr. Dunn charged 6.8 hours ($1,360) for "Misc. File tasks and review" on March 22, 2010;

ii. Mr. Dunn billed for work during the second accounting period relating to obtaining a settlement from Corning, but also paid the law firm of Sullivan & Worcester LLP of Massachusetts $5,847.48 for "Corning expenses," without sufficient detail in his invoices to allow the Court to determine whether his work duplicated that of the Sullivan firm;

iii. Mr. Dunn charged approximately $6,000 in the second accounting period for work he did on IRS Tax Form 706. These charges were in addition to work performed by Mr. Slocum's accounting firm in actually preparing the form. (Over $33,000 of work was billed by the accounting firm for this purpose.) Again, although Mr. Dunn contends the work he did saved time the accounting firm otherwise would have spent on the matter, at increased expense, he did not include sufficient detail in his invoices regarding his work on this Form to enable the Court to determine whether his work was duplicative.

(d) Over two days in 2011, Mr. Dunn charged .9 hours, and his associate charged 1.75 hours, for a total of $402.50 in attorney fees, to draft a motion to extend a deadline to file an accounting. The probate court has a Form for a Motion for Extension of Time (NHJB-2132-P) that can be completed on-line on the Judicial Branch website in 10 minutes or less.

D. <u>Mr. Dunn believed he could leave the determination of the reasonableness of his fees to the Probate Court.</u>

20. At the time that Mr. Dunn was submitting the Accountings and his requests for fees to the Probate Court, he erred on the side of exhaustion, tracking *all* time spent by any timekeeper in his firm on the Donovan Estate. Knowing that the Probate Court was the "gatekeeper" for determining reasonableness of fees, Mr. Dunn believed at the time that he satisfied his obligations both to the Estate and under the Rules by accurately noting all time spent and then submitting requests to the Court for its approval based on his invoices.

21. The parties agree that Mr. Dunn undertook this engagement knowing a system was already in place for overseeing the reasonableness of his fees. That system included a mechanism for resolving disputes over those fees.

22. The Model Rules provide that, when a procedure exists in the principal forum for resolution of fee disputes, "the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure." ABA Model Rule 1.5, Comment [9].

23. The New Hampshire Ethics Committee has similarly observed that, in the case law considering attorneys' fees requests, the rejection of a portion of an attorney's fees as unreasonable in one forum (*e.g.*, an application for fees in the probate process) does not dictate the same result in the disciplinary process: "None of the cases contains even a hint that a rejection of a portion of the [fee] application might raise the specter of a misconduct complaint." Ethics Committee Comment on New Hampshire Professional Conduct Rule 1.5. [6]

E. The billing disputes were resolved in the probate court.

24. In this case, the parties' fee dispute arose in the probate court, the parties had their say on the issue, and the court was empowered to resolve the dispute.

25. The parties reached agreement on the appropriate amount of fees to be paid for Mr. Dunn's work for the Trustee following a mediation of the issue on November 18, 2014. The parties reached agreement on the appropriate amount of fees to be paid for Mr. Dunn's work for the Executor on June 15, 2015.

26. In each matter, the parties submitted a joint motion to the Probate Court, asking to approve the fees as modified, and finding that the adjusted amount of fees "are fair and reasonable within the parameters and meaning of Probate Division Rule 88 and *In re: Rolfe,* 136 N.H. 294 (1992)."

27. The Probate Court found the modified fees were fair and reasonable on July 30, 2015.

F. The issue is unlikely to recur in Mr. Dunn's practice.

28. Mr. Dunn had a duty to maximize the Estate for the benefit of the beneficiaries and acknowledges that he could have better accomplished his time-keeping and that of his staff, and more thoughtfully revised his fee requests to avoid requests like those noted *supra*, ¶ 19, a-c.

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[6] *See also McKenzie Constr., Inc. v Maynard*, 758 F. 2d 97, 100 (3rd Cir. 1985)("[I]n a civil action, a fee may be found to be 'unreasonable' and therefore subject to appropriate reduction by a court without necessarily being so 'clearly excessive' to justify a finding of a breach of ethics.").

29. In hindsight, Mr. Dunn recognizes that he should have undertaken an initial review of his fees, prior to submitting his invoices to the Probate Court: (1) determine whether any portion of time spent should be written off as duplicative or otherwise not reasonable, and (2) to elaborate or provide further detail for blocks of time that were too vague to allow the Court to determine reasonableness.

30. Mr. Dunn had never handled an estate matter of this complexity in his four decades of practicing law. Encountering such a situation again in his career is unlikely. Whether or not that occurs, Mr. Dunn is now well educated on the issues that led to this disciplinary matter. The parties agree similar conduct is unlikely to recur in the future.

Stipulation ¶¶ 1-30.

II. RULINGS OF LAW

The Committee concludes that there is clear and convincing evidence that William H. Dunn has violated the following Rules of Professional Conduct by clear and convincing evidence:

Rule 1.5: Fees

Rule 1.5 prohibits a lawyer from charging or collecting an "unreasonable fee." Mr. Dunn violated Rule 1.5 when, *e.g.*, he failed to adequately review his bills in advance of submitting them to the court, when he charged associate time for non-professional tasks, and when he insufficiently described his work so the court was unable to adequately assess its value, as described herein, *supra*, ¶¶ 19, a-c.

Stipulation ¶¶ 33-34.

Rule 8.4(a): General Rule

Having found the foregoing violation, there is clear and convincing evidence that Mr. Dunn's conduct, as described herein, violated Rule of Professional Conduct 8.4(a).

Stipulation ¶ 35.

III. ANALYSIS

The Stipulation included an agreement on recommended sanctions based on the violations of Rules 1.5 and 8.4(a). For the reasons set forth below, the Committee agrees with and accepts the recommended sanction of a reprimand and an order to pay costs of investigation and prosecution.

Prong I: Duty Violated

Under the first prong of the analysis, Mr. Dunn violated duties owed to his client, the Executor, who in turn owed duties that flowed to the beneficiaries of the Estate to maximize the Estate for their benefit. *See Standards* § 7.0.

Prong II: Mental State: Knowing or Negligent

With respect to Mr. Dunn's mental state under the second prong of the sanction analysis, the parties agree that Mr. Dunn's mental state was negligent.

Prong III: Injury or Potential Injury

The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Dunn's misconduct.

Mr. Dunn's conduct caused injury to the beneficiaries. Although the Court acted as gate-keeper in determining reasonable fees, the beneficiaries spent money paying their attorneys to submit objections to the various fee requests contained in the Accountings submitted by Mr. Dunn.

Mr. Dunn's violation of Rule 1.5 implicates Section 7.0 (Violations of Duties Owed as a Professional) of the *Standards*, which provides as follows:

> 7.1 Reprimand[7] is generally appropriate when a lawyer negligently 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.

Under the foregoing circumstances, the parties agree that the baseline sanction for Mr. Dunn's conduct is a public censure. *See Standards* § 7.3.

Prong IV: Aggravating and Mitigating Factors

The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g.*, *Conner's Case*, 158 N.H. 299, 303 (2009). In this case, there is only one

[7] Section 7.3 uses the term "Reprimand." The most analogous sanction in New Hampshire is a Public Censure.

aggravating factor: Mr. Dunn's substantial experience in the practice of law. *See Standards* § 9.22.

Mitigating factors include the absence of a prior disciplinary record in Mr. Dunn's 42 years of practice, full and free disclosure to the ADO and cooperative attitude in proceedings, remorse, and character and reputation. *See Standards* § 9.32. The parties agreed that the mitigating factors evident in this case outweigh the aggravating factors and warrant a downward departure to a reprimand as the appropriate sanction.

IV. SANCTION

Having made the aforementioned findings and rulings, the Committee concludes that the appropriate discipline in this matter is a reprimand. The Committee's recommended sanction is in accord with the purposes of attorney discipline. *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 *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).

VI. COSTS

William H. Dunn has signed an agreement to pay costs of the investigation and prosecution of this disciplinary matter. The Committee approves this agreement. Mr. Dunn shall be responsible for all costs associated with the investigation and prosecution of this matter.

VII. CONCLUSION

For all of the above reasons, the Committee approves the stipulation and conditions in its entirety and issues this reprimand.

July 11, 2016

David M. Rothstein
Chair

cc: Sara S. Greene, Disciplinary Counsel
William C. Saturley, Esquire
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