

New Hampshire Supreme Court  
**Professional Conduct Committee**

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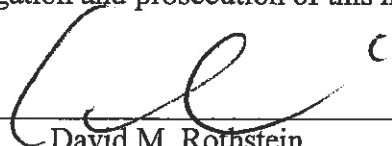
*Miller, Jeremy A. advs. Attorney Discipline Office - #11-059*

**Recommendation: One Year Suspension and Order on Costs**

On December 8, 2015, the Professional Conduct Committee (the "Committee") deliberated the Hearing Panel's Approval of Stipulation; Stipulation as to Facts, Violations, and Sanction (the "Stipulation") and the Agreement to Pay Costs of Disciplinary Matter (collectively, the "Record"). Members present included David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Peter G. Beeson, Scott H. Harris, Mona T. Movafaghi and Georges J. Roy. Susan R. Chollet, Richard H. Darling and Richard D. Sager were absent. Margaret R. Kerouac was not present during the discussion and vote on this matter. Martha Van Oot was recused.

Having reviewed the Record, the Committee approved the facts as stipulated, by clear and convincing evidence. The Committee approved the findings of violations of the New Hampshire Rules of Professional Conduct (the "Rules") as stipulated and to recommend One Year Suspension for violations of Rules 1.7(b), 1.5(a), 8.4(c), 3.4(c) and 8.4(a), as well as reimbursement of the Committee for all costs of investigation and prosecution of this matter.

December 10, 2015

  
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David M. Rothstein  
Chair

Distribution:

Elizabeth M. Murphy, Assistant Disciplinary Counsel  
Jeremy A. Miller, Esquire  
File

**NEW HAMPSHIRE SUPREME COURT**

**HEARINGS COMMITTEE**

Miller, Jeremy A.

advs.

Attorney Discipline Office

#11-059

**STIPULATION AS TO FACTS, VIOLATIONS,  
AND SANCTION**

Respondent Jeremy A. Miller, Esq., and the Attorney Discipline Office  
(ADO) stipulate as follows:

**A. Background Facts**

1. Mr. Miller is an attorney licensed to practice law in New Hampshire. Mr. Miller was admitted to practice on October 30, 2000.
2. Mr. Miller is also admitted to practice law in Maine.
3. Mr. Miller currently operates his law office as J. Miller & Associates, PLLC, 210 North State Street, Suite 2B, Concord, New Hampshire 03301-3408. During the time period material to this proceeding, Mr. Miller practiced as J. Miller & Associates, PLLC, 100 Hall Street, Suite 102, Concord, New Hampshire 03301.

## **B. Facts**

4. At all times material to this proceeding, Mr. Miller served as legal counsel and as in-house counsel for David Johnston Development, LLC (“Johnston Development”), a real estate development company. Mr. Miller also utilized Johnston Development’s office address of 183 Laconia Road, Tilton, NH 03276 during a portion of the representation.
5. Mr. David J. Johnston (“Mr. Johnston”) is the sole member of Johnston Development. Mr. Miller served as legal counsel to Mr. Johnston and his various business entities beginning in 2001. Mr. Miller no longer represents Mr. Johnston and has not represented him for the last several years.
6. Mr. Miller and Mr. Johnston did not have a written agreement regarding Mr. Miller’s role as in-house counsel for Johnston Development, although the role was offered to Mr. Miller by Mr. Johnston. Mr. Miller did not keep time records and was not paid as a W-2 employee. Mr. Johnston paid Mr. Miller from his profits on various transactions.

### **Initial Negotiations for Purchase of Lakes Region Greyhound Park**

7. In the spring of 2005, the Lakes Region Greyhound Park (“race track”) in Laconia, New Hampshire was the subject of litigation among members of the Hart family, who owned the race track, in a case captioned *Hart Pari-Mutuel of New Hampshire, Inc., et. al. v. Joan G. Hart, et. al.*, Docket #04-E-0198, Belknap Superior Court. During the litigation, the court approved a bidding process for the sale of the race track.

8. The seller of the race track, New Hampshire Gaming, L.P. (“N.H. Gaming”) was represented by Ronald E. Cook, Esquire (“Mr. Cook”) of Cook & Molan, PA (“Cook & Molan”). Mr. Miller had previously held an of counsel role with Cook & Molan, but had his own law practice in 2005.
9. Mr. Miller learned of the sale of the race track from Mr. Cook.
10. Mr. Johnston contacted Mr. Christopher Gistis (“Mr. Gistis”) in March 2005, regarding the opportunity to buy the race track, advising Mr. Gistis that he had learned about the sale from Mr. Miller, who had been Mr. Johnston’s attorney.
11. Mr. Johnston and Mr. Gistis, an experienced businessman who operated hotels in New England through his company, Linchris Hotel Corporation, had participated together in other business ventures in the past.
12. Mr. Johnston and Mr. Gistis formed a joint venture, agreeing that Johnston Development would bid on the race track, and Mr. Gistis would provide the necessary deposit.
13. Mr. Gistis’s son, Mr. Glenn Gistis (“Mr. Glenn Gistis”), also became involved in the project. Mr. Glenn Gistis was the vice president of finance for the Linchris Hotel Corporation.
14. On March 22, 2005, Mr. Johnston entered into a Memorandum of Understanding with Allan E. Hart (“Mr. Hart”), the general manager for N.H. Gaming, which allowed Mr. Johnston to participate in the bidding process to acquire the race track.

15. Mr. Johnston consulted with Harry Heller, Esquire, an attorney licensed in Connecticut, and Mr. Miller for legal advice in entering into the Memorandum of Understanding and in placing the initial bid. Mr. Heller conducted the initial negotiations with Cook & Molan on behalf of Johnston Development.
16. On March 29, 2005, Mr. Gistis signed a Confidentiality Agreement on behalf of Mr. Johnston, in connection with the Memorandum of Understanding, that would allow Mr. Johnston and the seller to further explore the possibility of entering into a sales transaction for the race track.
17. On April 1, 2005, Mr. Johnston, on behalf of Johnston Development, submitted the initial offer to purchase the race track to Mr. Cook. Mr. Glenn Gistis drafted the offer letter. Mr. Gistis also participated in putting together the initial bid.
18. The initial bid amount of \$3,300,000.00 for the purchase rights was entered at Mr. Miller's suggestion. Based on a conversation with Mr. Cook, Mr. Miller believed that was the minimum amount the sellers would accept.
19. On April 6, 2005, the Belknap Superior Court identified "Johnston Development, LLC" as a "qualified bidder" for the race track purchase. Only qualified bidders were eligible to bid on the race track without posting a \$100,000.00 letter of credit.

20. On April 7, 2005, Mr. Cook responded to Mr. Johnston, advising that pursuant to the terms of the court-ordered sale process, the track's owners were required to hold the bidding process open until April 18, 2005. Bidders could supplement bids until 5:00 p.m. on April 18, 2005, and the Court would hold a hearing on April 28, 2005 to confirm the winner.
21. Mr. Johnston wrote to Mr. Cook on April 12, 2005, acknowledging Mr. Cook's receipt of the purchase offer and reserving his right to supplement the bid at any time prior to April 18, 2005 at 5:00 p.m.
22. On April 18, 2005, Mr. Johnston, on behalf of Johnston Development, entered a supplemental bid and successfully bid \$4,101,002.00 for the right to purchase the race track.
23. In order to hold the bid and proceed with the purchase, Mr. Gistis wired a deposit of five percent (5%) of the sale price, approximately \$205,051.00, drawn on his personal account, to the escrow account of Mr. Cook. Mr. Cook's firm then wired the deposit to a third party escrow agent, Patricia K. Mellor, Esquire of Merra, Kanakis, Creme & Mellor, P.C., to hold in an escrow account at her firm.

**Mr. Miller's Legal Representation of Johnston Development, LLC and Preti Flaherty's Legal Representation of Lakes Region Gaming, LLC**

24. From the time Mr. Johnston prepared the initial bid, Mr. Miller was involved as legal counsel for Johnston Development for purposes of the race track transaction. Mr. Miller's work included, but was not limited to, involvement in the initial conversations seeking investors; meeting with

the previous owners of the race track to procure information for Mr. Johnston and the Gistises; showing potential investors around the race track; and meeting with the various parties interested in becoming involved with the deal.

25. Consistent with Mr. Miller's and Mr. Johnston's usual practice, wherein Mr. Miller and Mr. Johnston determined compensation for Mr. Miller's legal work on an informal basis, Mr. Miller and Mr. Johnston did not enter into a written fee agreement or formal retention agreement for Mr. Miller's work related to the race track transaction.
26. Mr. Miller did not maintain time records for the work he did for Mr. Johnston or Johnston Development. Mr. Miller did not bill Mr. Johnston or Johnston Development on a monthly or quarterly basis for the work he did on the race track transaction.
27. After Johnston Development was awarded the winning bid for the race track, Mr. Johnston and the Gistises together engaged the law firm of Preti Flaherty to represent their interests in negotiating the purchase and sale agreement; to assist them in the acquisition of the race track; and to form the entity that would eventually own and operate the race track.
28. Mr. Heller no longer provided legal advice to Mr. Johnston regarding Mr. Johnston's efforts to purchase the race track after Johnston Development was awarded the winning bid.
29. Mr. Miller continued to work as legal counsel for Mr. Johnston and Johnston Development. However, Mr. Miller did not specifically inform

the Gistises that he was working as Johnston Development's attorney for purposes of the race track transaction. Mr. Miller had met Mr. Gistis before he became involved in the race track transaction, including at a baseball game where Mr. Johnston introduced Mr. Miller to Mr. Gistis as "my friend and attorney." As such, Mr. Gistis was generally aware that Mr. Miller and Mr. Johnston were friends and that Mr. Miller had represented Mr. Johnston in the past, and also represented Mr. Johnston with respect to another transaction that Mr. Gistis was involved in with Mr. Johnston.

30. On April 20, 2005, John M. Sullivan, Esquire, of Preti Flaherty wrote to Mr. Paul Kelley, executive director of the New Hampshire Pari-Mutuel Commission<sup>1</sup> ("PMC"), indicating that his firm represented "Messrs. Gistis and Johnston who are pursuing the acquisition of the Lakes Region Greyhound Park" and requested an application for a new license.
31. On April 21, 2005, Mr. Cook filed a Motion to Approve Sale to Johnston Development, LLC with the Belknap Superior Court.
32. On April 26, 2005, Preti Flaherty filed an appearance in the Hart litigation and filed a Motion requesting approval of the sale on behalf of Johnston Development, Mr. Johnston and Mr. Gistis.
33. The Belknap Superior Court granted the Motion to Approve Sale to Johnston Development on April 27, 2005.

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<sup>1</sup> The PMC is responsible for regulating horse and dog racing in New Hampshire. See N.H. Rev. Stat. Ann. § 284.

**Formation of Lakes Region Gaming, LLC and  
Application to the Pari-Mutuel Commission**

34. On April 27, 2005, Mr. Sullivan filed a certificate of formation with the New Hampshire Secretary of State, forming Lakes Region Gaming, LLC (“LRG”) to “own and operate a greyhound racing and pari-mutuel facility, as well as all other activities allowed for under the law.” The original members of LRG were Johnston Development and the Gistises. Mr. Glenn Gistis was initially designated as the manager.
35. On April 28, 2005, in a letter to Mr. Gistis, the law firm of Preti Flaherty confirmed its agreement to represent LRG in its purchase of the race track.
36. On April 28, 2005, Mr. Miller sent an e-mail to Mr. Glenn Gistis suggesting a way to organize the LLC, which included Johnston Development as a member of LRG.
37. Also on April 28, 2005, Mr. Daniel P. Luker, Esquire (“Mr. Luker”), of Preti Flaherty, e-mailed the Gistises and Mr. Johnston, and advised them that they would need to submit an application for a license to the PMC. Mr. Luker further stated:

I’ll prepare [an] assignment form under which Johnston Development will transfer its bid rights to Lakes Region Gaming, LLC. Fine by Cook, Seller will sign. Since Court order specifies Johnston Development as the approved purchaser, assignment should probably be sent to PMC with a letter explaining same principals, etc etc., so that they accept things under Lakes Region Gaming.
38. The next day, on April 29, 2005, Mr. Luker sent another e-mail to the Gistises and Mr. Johnston recognizing that the owner of the race track

would be LRG but the owner of the bid rights was Johnston Development. Mr. Luker sent a draft assignment of Johnston Development's bid rights to the Gistises and Mr. Johnston and advised them:

Fully-executed copy of something along the lines of the attached will need to be provided to the PMC (along with a cover letter confirming that Johnston Development bid was made on behalf of Chris and David, as already reported everywhere, and that principals of Lakes Region Gaming, LLC are the same) when the license application is submitted under the name of LRG.

39. Later that morning, after a discussion with Mr. Cook, Mr. Luker, concerned with the potential for further litigation with other parties interested in the purchase of the race track, sent an e-mail stating:

In thinking further about the closing vs. the license application, and mindful that the application will be a public document and that there are others out there who want to derail this, and given the express language of the Court's order, [sic] might be better to hold off on the assignment and simply make Johnston Development a member of Lakes Gaming so we can proceed to closing with the Court approved entity. Let's talk.

40. Mr. Miller was aware of these email discussions.
41. The Gistises agreed with Mr. Luker's suggestion and Johnston Development did become a member of LRG.
42. On May 2, 2005, Mr. Johnston, on behalf of LRG, executed an application for a license from the PMC, in which he represented that the track was in the process of being purchased by LRG. Mr. Miller drafted the application, which was signed by Mr. Johnston. Mr. Miller also witnessed Mr. Johnston's signature, on behalf of LRG.

43. The application stated:

These premises are in the process of being purchased by the applicant by way of a purchase and sales agreement between NH Gaming Association and the applicant. After such purchase is completed, the applicant will have sole ownership and control over the premises, facilities and all financial rights and obligations.

The applicant was LRG.

44. The purchase and sales agreement ("P&S"), signed on May 19, 2005, was entered into between N.H. Gaming and Johnston Development. The P&S provided that Johnston Development would have sixty days to conduct its due diligence in evaluating whether it wanted to close on the transaction.
45. The due diligence period would end on July 18, 2005. At that point, Johnston Development would either need to proceed with the purchase of the race track or notify N.H. Gaming that it would not proceed with the transaction. If it failed to notify N.H. Gaming of its decision by the July 18, 2005 deadline, the deposit would be lost. It was anticipated that the closing for the P&S would occur on or before August 2, 2005.
46. The May 19, 2005 P&S was negotiated primarily by the attorneys at Preti Flaherty and Mr. Glenn Gistis at the direction and for the benefit of LRG. Mr. Gistis, Mr. Johnston and Mr. Miller also contributed to the negotiations of the P&S.
47. Preti Flaherty billed the invoices for the legal work to LRG and LRG paid the legal fees for this work.

48. Mr. Miller continued to provide legal advice to Johnston Development with respect to the purchase of the race track, including advice with respect to the P&S.
49. Initially, the Gistises and Johnston Development were the only members of LRG. Eventually, Mr. Lawrence Kasser (“Mr. Kasser”) and Mr. Miller were added as members.
50. Mr. Kasser was added as a financial investor and Mr. Miller was added to LRG because he had informed Mr. Johnston of the sale of the race track.
51. The members of LRG determined that Mr. Kasser and Mr. Gistis would hold the largest shares because they planned to contribute the financing toward the purchase price. Mr. Johnston was to hold a twenty percent (20%) interest because he was contributing the P&S, which was written with his company’s (Johnston Development) name on it. Ultimately, Mr. Gistis chose to split his share with his son, Mr. Glenn Gistis, while Mr. Johnston chose to transfer a five percent (5%) portion to Mr. Miller.
52. At that time, Mr. Gistis was not aware that Mr. Miller was acting as Mr. Johnston’s counsel for purposes of the race track transaction.
53. On May 19, 2005, Mr. Miller, identifying himself as “Manager,” and acting on behalf of LRG wrote to Mr. Kelley at the PMC:

I am writing to you at the request of David Johnston in furtherance of his May 9<sup>th</sup>, 2005 letter and the license application of Lakes Region Gaming, LLC submitted to your office. At that time Mr. Johnston had indicated that there was a possibility that additional equity partners could be added. This is now the case. Lakes Region Gaming, LLC has added Mr. Lawrence Kasser and myself as members of the company. As such, I have prepared supplemental exhibits

correctly reflecting the ownership of Lakes Region Gaming, LLC as well as the requisite personal and financial documents.

54. As a result of the addition of Mr. Miller and Mr. Kasser, the members' interests were as follows:

Lawrence Kasser: 40 voting units;

Christopher Gistis: 20 voting units;

Glenn Gistis: 20 voting units;

Johnston Development, LLC: 15 voting units;

Jeremey Miller: 5 voting units.

55. In early June 2005, Mr. Kasser, Mr. Glenn Gistis, Mr. Gistis, Mr. Miller, and Mr. Johnston, as manager and sole member of Johnston Development, executed the "Limited Liability Company Operating Agreement of Lakes Region Gaming, LLC" (the "Operating Agreement").

56. The Operating Agreement provided that management of LRG was vested in a single manager. Mr. Gistis was designated the sole manager of LRG.

57. In relevant part, Section 10 of the Operating Agreement provided:

Members and Managers Engaging in Other Business Activities. Nothing in this agreement will preclude any Member or Manager(s) from engaging in any business or making any other investment, even though such business or other investment may be in competition with the Company. Any such business or investment may be undertaken with or without notice to or participation therein by the other Members or the Manager(s). Each Member and the Company acknowledge that the conduct described in the preceding two sentences does not constitute a breach of any fiduciary duty by the Member(s) or Manager(s) so engaged. Further, each Member and the Company hereby waive any right or claim he or it may have against the other Members

or the Manager(s) with respect to any such activity or the income or profits therefrom.

58. Section 13.7 of the Operating Agreement further provided:

Actions Requiring Supermajority Approval. Notwithstanding anything in this Agreement to the contrary, the following actions may not be taken unless authorized by the affirmative vote of Members holding seventy percent (70%) of the Voting Units; . . .

(c) the sale of all or substantially all of the assets of the Company. . .

(g) the assignment or sale of the management rights or operating licenses of the Company; or

(h) the incurrence of debt or the expenditure of capital funds in excess of \$1,000,000.

59. On or about June 9, 2005, LRG completed and submitted a revised and renewed Pari-Mutuel Application to the PMC for consideration.

60. Mr. Miller drafted the June 9, 2005 Application to the PMC.

61. The application included the same language as the first application, explaining that:

These premises are in the process of being purchased by the applicant by way of a purchase and sales agreement between NH Gaming Association and the applicant. After such purchase is completed, the applicant will have sole ownership and control over the premises, facilities and all financial rights and obligations.

The applicant remained LRG.

62. During the early part of the due diligence period, Mr. Gistis met with the New Hampshire Office of the Attorney General regarding the purchase of the race track.

63. LRG engaged an engineering firm to do a study of the real estate at the race track. LRG also hired Mr. Rick Newman as a lobbyist/consultant to represent LRG's interests in the New Hampshire legislature, and to advise LRG in its dealings with the PMC.
64. On June 13, 2005, Mr. Newman e-mailed Mr. Johnston, the Gistises, Mr. Kasser, and Mr. Miller, and stated he had noticed that the P&S listed only "Johnston Development" as the purchaser, while the application for a license filed with the PMC was filed by "Lakes Region Gaming."
65. In a June 13, 2005 letter, Mr. Gistis, acting as manager for LRG, wrote to Mr. Kelley, and advised that although the P&S attached to the application showed Johnston Development as purchaser of the track, "at the time of closing on the property, the deed and all assets will be conveyed to Lakes Region Gaming, LLC not Johnston Development, LLC."
66. In a June 14, 2005 letter to Timothy J. Connors, chairman of the PMC, Mr. Luker, as counsel to LRG, represented to the PMC that as a member of LRG, Johnston Development had agreed to contribute its purchase rights to LRG as part of its capitalization. Mr. Luker further represented that: "To the extent that any documentation of that transfer is necessary, it will be reflected in the records and capital accounting of LRG." Mr. Miller was copied on this letter.

**Lakes Region Gaming, LLC's Decision to Sell the Purchase Rights**

67. LRG's purchase of the race track never closed because, in late June 2005, a New Hampshire grand jury indicted a dozen people involved with the race track, many of whom had been heavy bettors there.
68. At that point, the members of LRG began to reconsider the purchase decision. The members decided to try to sell the right to purchase the race track so that they could recoup their expenses and possibly make a profit. If a profit was realized, it would be distributed according to each member's interest in the company.
69. Mr. Gistis expected Mr. Johnston would take the lead in trying to sell the purchase rights, because he had been involved in putting together the deal.
70. Mr. Gistis asked Mr. Johnston to keep him informed of the efforts to sell the purchase rights.
71. On June 28, 2005, Mr. Gistis wrote to Mr. Kelley stating: "In light of the unforeseen events of the past week, we are respectfully requesting that the Commission table our 2005 and 2006 license applications and take no further action on such until further notice." Mr. Gistis further advised: "In addition, please direct all further correspondence to Mr. David Johnston, *as he will be acting on behalf of Lakes Region Gaming, LLC from this point forward.*" (Emphasis added).
72. Mr. Miller drafted Mr. Gistis's June 28, 2005 letter to the PMC as reflected in his June 28, 2005 e-mail to Mr. Glenn Gistis indicating:

“Here is the letter for Chris to sign and fax over to the commission this afternoon. You should also drop the original in the mail, but it is important that they get the fax today. Let me know if you have any questions.” Mr. Miller later e-mailed Mr. Glenn Gistis, and requested a copy, of the signed letter to Mr. Kelley, for the file.

73. To give the parties more time to sell the bid rights, on June 28, 2005, Mr. Luker formally requested a 30-day extension of the July 18, 2005 end date from the seller, because on July 18, 2005, the deposit would become nonrefundable. Mr. Luker noted: “LRG is still interested in going forward with the transaction . . . .” Mr. Cook denied the request in a letter dated July 7, 2005.
74. In early July 2005, Mr. Gistis received a telephone call from Mr. Bill McLaughlin, who told him that he had spoken with Mr. Johnston on behalf of one or more clients who were interested in purchasing the right to purchase the track from LRG. Mr. McLaughlin was concerned that he had not heard back from Mr. Johnston or any other LRG members.
75. Mr. McLaughlin told Mr. Gistis that he suspected Mr. Johnston might be trying to do an “end run” around LRG by selling the bid rights for his own benefit.
76. On or about July 8, 2005, Mr. Gistis and Mr. Glenn Gistis had a telephone conference with Mr. Johnston regarding Mr. McLaughlin and the sale process. Mr. Johnston informed them that he had not told them about Mr. McLaughlin’s inquiries because they were not in writing. He

reassured them that he would never try to sell the bidding rights for his own benefit.

77. Mr. Johnston told the Gistises that he had not received inquiries or offers to purchase the assets of LRG or the right to purchase the track. Mr. Johnston assured them that he would notify the other members of LRG if, and when, he received any such offers or inquiries. Mr. Miller was not directly involved in the conversations with Mr. McLaughlin.

**Johnston Development, LLC's Deal with Torguson Gaming Group, Inc.**

78. During the period Mr. Johnston was seeking potential buyers for the purchase rights, the P&S was secured by the \$205,051.00 deposit made by Mr. Gistis. The purpose for allowing the deposit to remain in place was to allow Mr. Johnston, on behalf of LRG, to find a buyer for the P&S and to allow LRG to recoup its expenses and possibly make a profit on the transaction.
79. When Mr. Cook denied LRG's June 28, 2005 request for an extension of the due diligence deadline, Mr. Luker e-mailed Mr. Gistis, and recommended that LRG send a request letter to Mr. Cook by Friday, July 15, 2005, to ensure the safe return of the deposit.
80. As the July 18, 2005 due diligence deadline drew closer, Mr. Gistis had several communications with Mr. Johnston to check on his progress, and to emphasize that without a firm arrangement in place to "flip the deal," LRG would insist on the return of its deposit.

81. On July 14, 2005, Mr. Cook wrote to Mr. Johnston, and confirmed that the “‘due diligence end date’ occurs at the close of business (5:00 p.m.) on July 18, 2005.”
82. On Friday, July 15, 2005, Mr. Johnston wrote to Mr. Cook and confirmed that on July 18, 2005, the due diligence period would end and “my initial 5% deposit becomes non-refundable.” Mr. Johnston suggested that he submit \$10,000.00 to be credited toward the purchase price, in exchange for a ten day extension of the due diligence deadline. Mr. Cook responded via a faxed letter that the seller had declined to accept the offer.
83. Mr. Johnston faxed Mr. Cook a reply letter on July 15, 2005 indicating that if an agreement could not be reached with regard to an extension, he wanted the deposit returned. Mr. Cook responded with a faxed letter acknowledging that the deposit would be returned on July 18, 2005, if a further agreement could not be reached.
84. On July 15, 2005, Mr. Miller faxed a copy of Mr. Cook’s letter, indicating that the deposit would be returned, to Mr. Gistis.
85. Mr. Gistis considered this letter his assurance that his deposit would not be lost. He heard nothing further from Mr. Miller or Mr. Johnston until July 20, 2005, when he was contacted for his bank account information.
86. Mr. Miller drafted or edited all of the correspondence from Mr. Johnston to Mr. Cook on July 14 and 15, 2005. Mr. Miller knew that Mr. Gistis had been asking for his money back.

87. Mr. Gistis, Mr. Glenn Gistis and Mr. Kasser were unaware that Mr. Johnston and Mr. Miller had been negotiating with a number of other potential buyers on Johnston Development's behalf.
88. In particular, on or about July 5, 2005, Mr. Johnston and Mr. Miller began negotiating with Mr. Marlin Torguson ("Mr. Torguson"), an investor in gaming operations, to sell the purchase rights to his company.
89. As a result of those negotiations, on or about July 15, 2005, Mr. Torguson's company, Torguson Gaming Group, Inc. ("Torguson Gaming") reached an agreement with Mr. Johnston to pay Johnston Development \$5,000,000.00 for the right to purchase the race track for \$4,101,002.00, resulting in Johnston Development receiving a net profit of \$898,998.00. The agreement also provided that Torguson Gaming would pay Johnston Development an additional \$7,500,000.00 if slot machine gambling occurred at the track within two years, and \$5,000,000.00 if such gambling occurred after two years but within twelve years following the purchase of the assets from Johnston Development.
90. Neither Mr. Miller nor Mr. Johnston advised the other members of LRG of the agreement.
91. During this time, Mr. Gistis's \$205,051.00 deposit remained in escrow holding the purchase rights.
92. On Monday, July 18, 2005, Mr. Johnston reached an agreement with the seller, through his counsel, Mr. Cook, to extend the "due diligence" deadline for seven days.

93. In his letter to Mr. Cook, Mr. Johnston confirmed: "The deposit money, \$205,051.00, will remain in your escrow account, but will now become nonrefundable on July 25, 2005 at 5:00 P.M. . . . In exchange for this extension I am submitting an additional \$50,000.00. . . . This \$50,000.00 sum is nonrefundable, but will be credited towards the purchase price at closing."
94. Mr. Miller loaned to Mr. Johnston the \$50,000.00 to extend the due diligence deadline. Mr. Miller and Mr. Johnston did not enter into a written agreement with respect to the \$50,000.00 loan.
95. As of July 18, 2005, Mr. Gistis's money had not been returned to him, despite his request for its return. Mr. Gistis was not made aware that the due diligence deadline had been extended past July 18, 2005 at 5:00 p.m.
96. Also on July 18, 2005, Mr. Torguson agreed, in effect, to replace the \$205,051.00 held in the escrow account. However, he was unable to submit the funds before the end of the business day on July 18, 2005.
97. Accordingly, Mr. Miller prepared and/or revised a promissory note on behalf of Johnston Development to loan the \$205,051.00 deposit to Torguson Gaming. The July 18, 2005 note carried no interest, and was payable in one day.
98. The Gistises and Mr. Kasser were not aware of the promissory note.
99. In compliance with the promissory note, Torguson Gaming wired funds to the seller's account to replace Mr. Gistis's deposit on or about July 19,

2005. Records reflect that on Wednesday, July 20, 2005, Mr. Cook's office wired \$205,000.00 to the personal account of Mr. Christopher Gistis. (Although the original deposit was \$205,051.00, records reflect that only \$205,000.00 was returned.)

**Mr. Miller's Legal Work on the Torguson Deal on Behalf of Johnston Development, LLC**

100. Mr. Miller and Mr. Johnston did not inform the other members of LRG of Torguson's agreement to purchase the P&S.
101. After the agreement was in place with Torguson Gaming, Mr. Miller on behalf of Johnston Development communicated with Torguson Gaming's counsel, Roger Frommelt, Esquire, as Johnston Development's legal counsel. Mr. Miller provided review and suggested revisions for the Compensation Agreement between Johnston Development and Torguson Gaming, and the Assignment of Real Estate and Business Assets Purchase and Sales Agreement ("Assignment").
102. Mr. Johnston signed the Compensation Agreement and the Assignment on August 25, 2005. The Assignment was an assignment of the May 19, 2005 P&S.
103. In anticipation of the closing on the race track deal, Mr. Johnston requested that Preti Flaherty release the LRG file to Mr. Miller. Mr. Miller subsequently retrieved the Preti Flaherty file from their office.
104. The sale of the race track and Assignment of the P&S to Torguson Gaming closed in September 2005.

105. Mr. Gistis did not learn of the sale of the P&S until after the closing when Mr. Johnston disclosed it to him.
106. Ultimately, Torguson Gaming paid Johnston Development \$898,998.00 for the right to purchase the race track. Mr. Johnston transferred \$445,000.00 to Mr. Miller as compensation for the work Mr. Miller had done for him on this transaction, and for past legal work. Mr. Johnston and Mr. Miller did not enter into a written agreement regarding this transfer of funds.
107. At Mr. Johnston's request, Mr. Miller reinvested the \$445,000.00 into another of Mr. Johnston's projects. After the closing on the race track, Mr. Johnston repaid Mr. Miller the \$50,000.00 that Mr. Miller had loaned him. Mr. Miller paid the tax liability for his receipt of the \$445,000.00.
108. LRG, through the Gistises and Mr. Kasser, paid Preti Flaherty's legal bill for negotiating the May 19, 2005 P&S and the fees for the services of the engineering firm and Mr. Newman, the lobbyist.

**Litigation Between Mr. Johnston and Johnston Development, LLC,  
Mr. Miller and Lakes Region Gaming, LLC**

109. Thereafter, Mr. Johnston and Mr. Miller became involved in lengthy and protracted litigation with the other members of LRG, the Gistises and Mr. Kasser, in a case captioned *David Johnston Development, LLC et. al v. Lakes Region Gaming, LLC*, Case No. 217-2006-EQ-00112 (Merrimack Superior Court). The litigation was initiated in the spring of 2006.

110. On March 25, 2008, Mr. Miller was named a third party defendant based on claims of: (1) breach of the LRG Operating Agreement; (2) request for an accounting and constructive trust; (3) breach of fiduciary duties; (4) fraud; (5) unjust enrichment and (6) enhanced compensatory damages.
111. A default judgment was entered against Mr. Johnston and Johnston Development on April 21, 2010.
112. A bench trial went forward against Mr. Miller beginning on January 26, 2011. The primary issue during the trial was whether the May 19, 2005 P&S agreement belonged to Johnston Development or LRG at the time Mr. Johnston sold the purchase rights to Torguson Gaming.
113. In Mr. Miller's post-trial memorandum, his counsel asserted:

Miller was never asked anything about Johnston's dealings regarding his bid rights. Furthermore, as legal counsel to Johnston, as Johnston was working on a project outside the LLC it would have been unethical, and actionable by Johnston should it have occurred for Miller to discuss Johnston's legal matters with **anyone**. (Emphasis in original).
114. In an April 1, 2011 Order, the Court found Mr. Miller "liable for breaching his duty of good faith and loyalty to the Lakes [Region] Gaming parties by appropriating an opportunity which belonged to the LLC using property of the LLC, the \$205,051.00, which was being held for the purpose of owning the race track, failing to inform the Lakes [Region] Gaming [p]arties of a corporate opportunity and appropriating that opportunity for himself." The Court held Mr. Johnston, Johnston

Development and Mr. Miller jointly and severally liable to LRG and its members for \$898,998.00.

115. The Superior Court's April 1, 2011 Order is incorporated herein by reference and attached to this Stipulation as Exhibit A. On April 4, 2011, the Court referred the matter to the Attorney Discipline Office.
116. Mr. Miller appealed the Court's decision to the New Hampshire Supreme Court. *Lakes Region Gaming v. Miller*, Docket No. 2011-394. After briefing and oral argument, the Supreme Court affirmed the trial court's decision in an opinion dated February 13, 2013. *See Lakes Region Gaming v. Miller*, 164 N.H. 558 (2013).
117. The Supreme Court's February 13, 2013 Order is incorporated herein by reference and attached to the Stipulation as Exhibit B.
118. At this time, post-judgment litigation in *David Johnston Development, LLC et. al v. Lakes Region Gaming, LLC*, Case No. 217-2006-EQ-00112 (Merrimack Superior Court) is on-going. Pursuant to a May 31, 2013 Superior Court Order, LRG currently holds a judgment for \$1,032,058.86 against Mr. Miller, attached hereto as Exhibit C.
119. On May 6, 2015, the court entered a finding of civil contempt against Mr. Miller for his failure to certify to the court that he had complied with discovery obligations by April 30, 2015.
120. On May 28, 2015, the Court granted a Motion to Rescind Contempt Order based on Mr. Miller's compliance with discovery obligations at that time.

121. On August 14, 2015, counsel for LRG filed a Motion for Contempt for Mr. Miller's failure to provide an updated financial affidavit. *See Exhibit D.*
122. The Court granted that Motion for Contempt on August 27, 2015. *See Exhibit E.*

### **C. Disciplinary Rules Violated**

123. The parties agree that Mr. Miller's conduct as set forth above involves violations of the New Hampshire Rules of Professional Conduct 1.7(b), 1.5(a); 8.4(c), 3.4(c) and 8.4(a), as set forth below.
124. The Rules in effect at the time of the violation should be applied. *See Lane's Case*, 153 N.H. 10, 16 (2005).

#### **Rule 1.7: Conflicts of Interest (2005)**

125. The facts as set forth above are incorporated by reference.
126. The parties agree that Mr. Miller's actions give rise to three separate violations of Rule 1.7(b).
127. Rule 1.7(b) states as follows:
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
- (1) the lawyer reasonably believes the representation will be not adversely affected; and
  - (2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**I. Mr. Miller's Responsibilities to Lakes Region Gaming, LLC  
(Beginning in June 2005)**

128. At all times relevant to the underlying action, Mr. Miller acted as legal counsel for Mr. Johnston and Johnston Development. In the spring and summer of 2005, Mr. Miller provided legal advice to Mr. Johnston and Johnston Development with respect to the race track transaction.
129. In particular, Mr. Miller, in his role as counsel, provided legal advice to Mr. Johnston with respect to: the bidding process to secure the right to purchase the race track; securing investors in the project; drafting and submitting a license to the PMC; negotiating and entering into the May 19, 2005 purchase and sale agreement; formulating the entity that was to own the race track; and drafting Mr. Johnston's communications with Mr. Cook.
130. In early June 2005, Mr. Miller became a 5% member of LRG. LRG was formed for the specific purpose to own and operate the race track.
131. Mr. Miller's status as of June 2005, as a member of LRG, created fiduciary duties and responsibilities to the other members of LRG, including Mr. Gistis, Mr. Glenn Gistis, Mr. Kasser, and Johnston Development.
132. Mr. Miller's representation of Johnston Development may have been materially limited by Mr. Miller's fiduciary responsibilities to LRG and its members.
133. It was not reasonable for Mr. Miller to conclude that his representation of

Johnston Development would not be adversely affected by Mr. Miller's responsibilities to LRG.

134. Mr. Johnston did not provide consent to Mr. Miller's representation of Johnston Development while a member of LRG, after consultation and with knowledge of the consequences.
135. Likewise, Mr. Miller did not inform the members of LRG that he was acting as legal counsel to Mr. Johnston and Johnston Development for purposes of the racetrack transaction, and Mr. Miller did not gain their consent.
136. Ultimately, Mr. Miller was, in fact, materially limited by his responsibilities to both Mr. Johnston and LRG, as evidenced in Mr. Miller's post-hearing memorandum. Mr. Miller argued his communication with fellow members of LRG was constrained by the existence of his attorney-client obligations toward Mr. Johnston.

## **II. Mr. Miller's Personal Interest in Lakes Region Gaming, LLC**

137. Once Mr. Miller became a 5% member of LRG in June 2005, he had a personal and financial interest in the race track transaction. At the same time, Mr. Miller continued to act as legal counsel to Johnston Development in the same transaction.
138. Mr. Miller's personal interest may have materially limited his representation of Johnston Development with respect to the race track transaction.

139. It was not reasonable for Mr. Miller to believe that his representation of Johnston Development would not be adversely affected by his membership in LRG.
140. Mr. Miller's 5% interest reduced Johnston Development's share in LRG. Mr. Miller's advice to Mr. Johnston and Johnston Development could have been affected by his financial stake in LRG.
141. Moreover, because he was both a member of LRG, and counsel for one of its members, Mr. Miller could have been required to disclose client confidences in order to defend himself in any subsequent litigation of the matter between the members of LRG. In fact, Mr. Miller's ability to adequately represent Mr. Johnston and Johnston Development was eventually materially limited by Mr. Miller's personal interest in his own litigation defense.
142. Mr. Miller further developed a personal conflict of interest when he invested \$50,000.00 of his own funds to extend the due diligence deadline beyond July 18, 2005. This personal interest may have also materially limited Mr. Miller's representation of Mr. Johnston and Johnston Development with respect to the race track transaction, affecting his objective advice to his client.
143. It was not reasonable for Mr. Miller to believe that the representation of Mr. Johnston and Johnston Development would not be adversely affected.

**III. Mr. Miller's Responsibilities to Johnston Development, LLC**  
**(After July 18, 2005)**

144. After Mr. Johnston and Johnston Development reached an agreement to sell the purchase rights to Torguson Gaming, Mr. Miller was actively involved as legal counsel for Mr. Johnston and Johnston Development in an effort to negotiate the Compensation Agreement and Assignment with Torguson Gaming.
145. At that time, Mr. Miller had loaned \$50,000.00 of his own money to assure that the deal with Torguson Gaming went forward. He had a personal interest and financial interest in the transaction's success. This created the possibility that Mr. Miller's responsibilities to his client would be materially limited by Mr. Miller's personal interest in the outcome.
146. In particular, Mr. Miller could no longer offer objective legal advice because he had a personal and financial interest in the transaction's success.
147. It was not reasonable for Mr. Miller to believe that his representation of Mr. Johnston's and Johnston Development's interests would not be adversely affected.
148. The parties agree that there is clear and convincing evidence that Mr. Miller's continued representation of Mr. Johnston and Johnston Development in the race track transaction while participating in the same transaction as a member of LRG, and Mr. Miller's loan of \$50,000 to Mr. Johnston while serving as counsel in the same matter, gave rise to

three concurrent conflicts of interest and, as such, three violations of Rule 1.7(b).

**Rule 1.5: Fees (2005)**

149. The facts as set forth above are incorporated by reference.

150. Rule 1.5(a) states as follows:

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or *clearly excessive fee*.<sup>2</sup> The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent. (Emphasis added).

151. After the sale of the race track closed in September 2005, Mr. Johnston paid Mr. Miller \$445,000.00 from the sale of the purchase rights and the

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<sup>2</sup>The Rule 1.5(a) violation as set forth in this Stipulation reflects the language of the rule as it read in 2005. The Notice of Charges mistakenly set forth the current Rule 1.5(a) language as follows: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or *unreasonable fee or an unreasonable amount for expenses*. The factors to be considered in determining the reasonableness of a fee or *expenses* include the following:" (Emphasis added). Notwithstanding the typographical error in the Notice of Charges, Mr. Miller has agreed to the Rule 1.5(a) violation in effect in 2005 and agrees the Notice of Charges as filed put him on notice of the allegations against him on the Rule 1.5 charge.

Assignment of the May 19, 2005 P&S to Torguson Gaming. The payment was for Mr. Miller's legal assistance with the race track transaction and for past legal work Mr. Miller had done for Mr. Johnston and for Johnston Development.

152. The payment of \$445,000.00 for approximately six months of legal work constitutes a clearly excessive fee.
153. The parties agree that there is clear and convincing evidence that Mr. Miller's conduct as described herein constitutes a violation of Rule 1.5(a).

**Rule 8.4(c): Dishonesty, Fraud, Deceit or Misrepresentation (2005)**

154. The facts as set forth above are incorporated by reference.
155. 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;

**Agreement to Sell the Purchase Rights to Torguson Gaming**

156. Once Mr. Miller became a member of LRG, he owed the fiduciary duties of good faith and loyalty to the other members of LRG.
157. Mr. Miller knew of the joint venture between Mr. Johnston and Mr. Gistis, which preceded the creation of LRG. Mr. Miller knew that the stated purpose of LRG was to own and operate the race track.
158. Mr. Miller knew that Mr. Gistis originally made the \$205,051.00 deposit so that Mr. Gistis could be part of the race track purchase.

159. Mr. Miller knew that LRG retained the law firm of Preti Flaherty to negotiate the May 19, 2005 P&S agreement and retained the services of the engineering firm and Mr. Newman.
160. Mr. Miller knew that Johnston Development's bidding rights were not immediately assigned to LRG in order to avoid potential litigation with other parties interested in the purchase of the race track.
161. Once the members of LRG decided to attempt to re-sell the purchase rights, Mr. Miller knew that Mr. Gistis continued to leave his money in the escrow account for the purpose of obtaining an agreement to sell the purchase rights so that the parties could recover their expenses and perhaps even make a profit.
162. As of July 15, 2005, Mr. Miller was aware that Mr. Gistis had requested a return of his deposit of \$205,051.00.
163. On July 15, 2005, Mr. Miller faxed a copy of Mr. Cook's letter, indicating that the deposit would be returned, to Mr. Gistis. At that time, Mr. Miller knew that Mr. Gistis was expecting the return of his deposit.
164. On or about July 15, 2005, Mr. Johnston and Mr. Torguson reached an agreement for the sale of the purchase rights to Torguson Gaming. Mr. Miller knew that Mr. Johnston had reached this agreement with Mr. Torguson.
165. Mr. Miller knew that Mr. Johnston was using Mr. Gistis's money in order to sell the May 19, 2005 P&S, or "flip the deal."
166. On July 18, 2005, Mr. Torguson agreed, as part of the arrangement with

Johnston Development, to replace the deposit of \$205,051.00 that Mr. Gistis had made to secure the bidding rights. Mr. Torguson was unable to provide the funds before the end of business on July 18, 2005. As a consequence, Johnston Development loaned the full amount of Mr. Gistis' deposit to Torguson Gaming, and, in return, received a promissory note that was payable in one day.

167. Mr. Miller, as counsel for Johnston Development, prepared and/or reviewed the promissory note from Torguson Gaming to Johnston Development.
168. Mr. Miller had a duty to the other members of LRG to inform them of the agreement with Torguson Gaming to buy the May 19, 2005 P&S.
169. Mr. Miller knowingly failed to inform the other members of LRG of this opportunity and knowingly appropriated the opportunity for his own benefit.
170. Mr. Miller, as legal counsel to Johnston Development, worked to draft the Assignment of the P&S to Torguson Gaming.
171. Mr. Miller, himself, profited substantially from the Assignment while failing to disclose his receipt of the profits to the members of LRG.
172. Mr. Miller's failure to inform the members of LRG, to whom he owed fiduciary duties, of the opportunity to sell and eventual sale of the race track to Torguson Gaming constitutes a misrepresentation by omission, and as such, a violation of Rule 8.4(c).

173. The parties agree that there is clear and convincing evidence that Mr. Miller's conduct, as described herein, constitutes violations of Rule 8.4(c).

**Rule 3.4(c): Fairness to Opposing Party and Counsel (2015)**

174. The facts as set forth above are incorporated by reference.

175. Rule 3.4(c) states as follows:

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

176. On March 12, 2015, Mr. Miller and his law firm, J. Miller & Associates, PLLC were found in contempt of court in the underlying litigation for failure to comply with discovery obligations.

177. On May 28, 2015, the Court granted a Motion to Rescind Contempt Order based on Mr. Miller's compliance with discovery obligations at that time.

178. On August 14, 2015, counsel for LRG filed a Motion for Contempt for Mr. Miller's failure to provide an updated financial affidavit. The Court granted the Motion for Contempt on August 27, 2015.

179. Mr. Miller's failure to comply with court obligations and the court's findings of contempt constitute a violation of Rule 3.4(c).

180. The parties agree that there is clear and convincing evidence that Mr. Miller's conduct, as described herein, constitutes of a violation of Rule 3.4(c).

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

181. Having found the foregoing violations, the parties agree that there is clear and convincing evidence that Mr. Miller's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

**D. Disciplinary Rules Dismissed**

182. In reaching this Stipulation, the ADO has agreed to dismiss the charges for three alleged violations of Rule 1.8 (a): Conflict of Interest: Prohibited Transactions. The parties agree that the concerns raised with respect to Mr. Miller's share in Lakes Region Gaming and Mr. Miller's \$50,000 loan to Mr. Johnston have been adequately addressed within the agreed upon Rule 1.7 (b) violation, "II. Mr. Miller's Personal Interest in Lakes Region Gaming, LLC." Likewise, the issues raised in the third Rule 1.8(a) charge, "III. Mr. Johnston's \$445,000.00 Payment to Mr. Miller" have been addressed by Mr. Miller's agreement that he violated Rule 1.5(a): Fees.
183. Additionally, in reaching this Stipulation, the ADO has agreed to dismiss the first Rule 8.4(c) charge regarding "I. Mr. Miller's Failure to Inform the Members of Lakes Region Gaming, LLC of His Representation of Johnston Development, LLC." While Mr. Gistis would testify that he was unaware Mr. Miller was working for Johnston Development with respect to the racetrack transaction, the ADO recognizes that Mr. Gistis would also testify that he was aware of the past attorney-client relationship between Mr. Johnston and Mr. Miller. Mr. Gistis would also testify that

he was aware the Mr. Miller was representing Mr. Johnston in another transaction that Mr. Johnston and Mr. Gistis were working on during the same time period as the racetrack transaction. The ADO further recognizes that Mr. Miller would call one or more witness who would testify that it was generally known among those working on the sale of the racetrack that Mr. Miller represented Mr. Johnston's interests. Based on these considerations, the ADO recognizes that a Rule 8.4(c) violation, based on this particular allegation, could not necessarily be proven by clear and convincing evidence.

184. In reaching this Stipulation, the ADO has agreed to dismiss the second Rule 8.4(c) charge titled "II. Promissory Note to Torguson Gaming." The parties have agreed to incorporate the pertinent facts regarding the promissory note in further support of the agreed upon Rule 8.4(c) violation, "Agreement to Sell the Purchase Rights to Torguson Gaming."

### **E. Recommended Sanction**

185. The Attorney Discipline Office and Mr. Miller jointly recommend and stipulate to a one-year suspension as the appropriate sanction in this matter. The parties agree that this sanction would serve the purposes of attorney discipline.
186. Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support this sanction.
187. 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).

188. 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.
189. 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”).
190. In the case of more than one finding of misconduct, the ABA recommends that the sanction imposed “should at least be consistent

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

191. Under the first prong of the analysis, Mr. Miller violated duties owed to his client, to the public, to the legal system and duties owed as a professional. *See Standards* §§ 4.3, 4.6, 5.1, 6.2 and 7.0.
192. Specifically, with respect to the Rule 1.7(b) violations, Mr. Miller owed a duty of loyalty to his client, Mr. Johnston and Johnston Development, and to the members of LRG to avoid conflicts of interest. With respect to the Rule 1.5 violation, Mr. Miller owed duty to the legal profession not to accept an unreasonable fee. With respect to the Rule 8.4(c) violation, Mr. Miller owed a duty to the general public, including the members of LRG, to exhibit the highest standards of honesty and integrity. Mr. Miller did not meet this duty when he failed to inform the other members of LRG, to whom he owed fiduciary duties, of the opportunity sell the P&S agreement to Torguson Gaming. With respect to the Rule 3.4(c) violation, Mr. Miller owed a duty to the legal system to obey court orders. Mr. Miller failed to meet this duty when he failed to comply with discovery requirements and was found in contempt of Court.

193. With respect Mr. Miller’s mental state under the second prong of the sanction analysis, the parties agree that Mr. Miller’s mental state was knowing<sup>3</sup> with respect to the rule violations.
194. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Miller’s misconduct. Mr. Miller’s conduct created potential harm because he ignored conflicts of interest that he knew existed and as a result, breached his duty of loyalty to his client and to the members of LRG. Mr. Miller caused harm to the legal profession when he accepted a legal fee from his client that was clearly excessive and comprised of profits that should have been shared or potentially should have been shared with the members of LRG.
195. Mr. Miller’s failure to advise his fellow LRG members of the opportunity to sell the P&S to Torguson Gaming in violation of Rule 8.4(c) caused actual harm to the reputation and the integrity of the legal profession because such an incident damages the public perception of attorneys and their trustworthiness in handling business transactions. Mr. Miller’s conduct also caused actual injury because the other members of

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<sup>3</sup> The ABA Standards, as well as New Hampshire’s Rules of Professional Conduct, differentiate between a knowing state of mind and an intentional state of mind. Knowing misconduct represents a less culpable mental state than intentional misconduct. 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 *ABA Standards* define “knowledge” as “conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.” *ABA 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.”). An intentional state of mind is the most culpable state of mind, defined in the *ABA Standards* as acting with “a conscious objective or purpose to accomplish a particular result.”

LRG were required to litigate through trial whether they were entitled to a share in the profits from the sale of the P&S agreement to Torguson Gaming. Additionally, Mr. Miller's failure to comply with court-ordered discovery obligations and failure to produce an updated financial affidavit to the opposing party has caused actual harm to the litigants in the on-going LRG litigation because the discovery process has been frustrated and delayed to financial detriment of the Gistises and Mr. Kasser, who have been required to incur on-going legal fees in litigating the matter and have not been paid any portion of the substantial judgment.

196. Several *ABA Standards* are implicated by Mr. Miller's violations of the Rules. Mr. Miller's violations of Rule 1.7 implicate Section 4.3 of the *Standards*, which provides:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

- (a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
- (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
- (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

- 4.32 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.
- 4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
- 4:34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

197. Mr. Miller knew of his representation of Mr. Johnston and Johnston Development when he became a 5% shareholder in LRG creating his own personal and financial interest in the racetrack transaction. Likewise, Mr. Miller knew that he was representing Mr. Johnston and Johnston Development when he loaned Mr. Johnston \$50,000 to ensure the option to purchase the racetrack remained open causing potential injury to his client. Mr. Miller's violations of concurrent conflicts of interest rules implicate *Standards*, Section 4.32.

198. Mr. Miller's violation of Rule 1.5 implicates *Standards*, Section 7.0 which provides, in pertinent part:

- 7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

- 7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.
- 7.3 Reprimand 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.
- 7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.
199. Mr. Miller's conduct with respect to his acceptance of a clearly excessive fee for the work he performed for Mr. Johnston on the racetrack matter implicates *Standards*, Section 7.2, in that Mr. Miller caused harm to the legal profession when he accepted a legal fee from his client that was clearly excessive. Moreover, a portion of that fee constituted profits to which the other members of LRG may have been entitled.
200. Mr. Miller's violation of Rule 8.4(c) implicates Sections 4.6 and 5.1 of the *Standards*, which provide, in pertinent part:
- 4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.
- 4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.
- 4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

*Standards*, Section 5.1 provides:

5.11 Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

201. While Mr. Miller did not deceive his client, Mr. Miller knew of the members of LRG's interest in the race track transaction and knowingly failed to disclose the opportunity to sell the P&S agreement to Torguson Gaming as outlined in the stipulated Rule 8.4(c) violation. Mr. Miller,

himself, profited from the failure to disclose the opportunity to the other members. As such, Mr. Miller's conduct implicates *Standards*, Section 4.62 and Section 5.13.

202. Mr. Miller's violation of Rule 3.4(c) implicates Section 6.2, which provides, in pertinent part:

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.

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.

203. Mr. Miller was aware that he did not comply with the court's discovery obligations and that he failed to provide a financial affidavit to the court as required. Mr. Miller's failure to comply with court orders has caused on-going interference in the LRG litigation and implicates *Standards*, Section 6.22.

204. Under the foregoing circumstances, the parties agree that the baseline sanction, for Mr. Miller's conduct is a suspension. *See Standards* §§ 4.32, 7.2, 4.62 and 6.22.
205. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.
206. In this case, there are two aggravating factors are present: Mr. Miller's selfish motive with respect to his receipt of \$445,000 for the sale of the P&S to Torguson Gaming, the repayment of the \$50,000 he loaned to Mr. Johnston and multiple offenses with respect to Mr. Miller's involvement with the racetrack transaction. *See Standards* § 9.22.
207. However, two mitigating factors are also present, including Mr. Miller's inexperience in the practice of law at the time the majority of the violations took place (Mr. Miller had been practicing for five years in 2005) and imposition of other penalties, in that LRG currently holds a judgment for \$1,032,058.86 against Mr. Miller.
208. The parties further note that Mr. Miller did not have a disciplinary history at the time the 2005 Rule violations occurred. However, Mr. Miller does currently have a disciplinary history that consists of a public censure (2014) for Mr. Miller's violations of the Maine Rules of Professional Conduct 1.3, 1.4, 5.1 and 5.3 and a three month suspension, conditionally suspended (2014) for violations of Maine Rules of Professional Conduct 1.3, 3.3(a) and 8.4(a) and (d). *See Exhibits F and G*, respectively. The public censure and suspended suspension were

issued in New Hampshire as reciprocal discipline given that Mr. Miller was initially disciplined in Maine in those matters. The parties agree that Mr. Miller's disciplinary history, or lack thereof, is neither an aggravating nor a mitigating factor for purposes of determining discipline in this particular case because Mr. Miller did not have a prior disciplinary history at the time of this conduct in 2005, however, he had a disciplinary history, when he violated the court orders in 2015,

209. The parties agree that the aggravating and mitigating factors evident in this case, combined with the baseline sanction analysis, indicate that neither an upward or downward departure from the baseline suspension is warranted. Taking all of the considerations and factors above together, the parties agree a one year suspension is an appropriate sanction.
210. This sanction is proportional to discipline imposed in other New Hampshire cases involving violations of Rules 1.7(b), 1.5, 8.4(c), and 3.4(c). Sanctions for such violations have varied, often resulting in a public censure, suspensions of varying length or disbarment (disbarment is most often imposed in matters involving intentional conduct.)
211. The following cases offer some guidance regarding Rule 1.7(b) violations. *Kelley's Case/Cahalin's Case*, 137 N.H. 314 (1993)(imposing public censures on two attorneys who represented two clients with substantially different interests in an estate.); *Richmond's Case*, 152 N.H. 155, 156 (2005)(imposing a six month suspension on respondent who violated

Rule 1.7(b) among other rule violations.). In *Richmond's Case*, the respondent violated Rule 1.7 in two different instances. In the first instance, the respondent represented two different co-venturers in an involuntary bankruptcy action against their former company. *Id.* at 156. The respondent failed to adequately identify conflicts of interest and failed to obtain both clients consent to the representation despite the conflicts. *Id.* at 157. In the second instance, the respondent formed and operated a company with a client, while serving as corporate counsel, without disclosing the potential conflict of interest. *Id. In re Wyatt's Case*, 159 N.H. 285 (2009)(imposing a two year suspension on a respondent who represented a ward in connection with a voluntary conservatorship, violated conflict of interest rules by concurrently representing a conservator in that matter, by concurrently and successively representing conservator and ward's wife in guardianship proceedings, and by successively representing conservator against ward's challenge to management of conservatorship.).

212. The following cases offer some guidance regarding Rule 1.5 violations: *Coffey's Case*, 152 N.H. 503 (2005)(disbarring attorney for several Rule violations, including a Rule 1.5(a) violation for charging his client a clearly excessive fee.); and *Bruza's Case*, LD-2010-012 (May 12, 2011)(imposing a six month suspension as baseline sanction for the most serious violation in the case, a knowing competence violation. Respondent was also found to have violated Rule 1.7(b) violation and

Rule 1.5 violation for charging for his services after a conflict of interest arose).

213. The following cases offer some guidance regarding Rule 8.4(c) violations:

*O'Meara's Case*, 150 N.H. 157 (2003)(imposing a public censure upon respondent who made false statements while representing himself in his own divorce.); *Grew's Case*, 156 N.H. 361 (2007)(imposing a two year suspension on recently admitted attorney who committed insurance fraud with respect to a motor vehicle accident he was involved in.); *Douglas' Case*, 156 N.H. 613, 620 (2007)(imposing disbarment on a respondent, who in addition to violating several provisions of Rule 1.15, also violated Rule 8.4(c) by misrepresenting the status of her client's funds in various correspondences. The Court also noted that a lawyer's failure to disclose important information may constitute misconduct under Rule 8.4(c).).

214. The following cases offer some guidance regarding Rule 3.4(c) violations:

*Feld's Case*, 149 N.H.19 (2002)(imposing a one year suspension for multiple violations of Rule 3.4 where respondent was found to have intentionally promulgated false answers during discovery.); *In re Kersey's Case*, 150 N.H. 585 (2004)(disbarring respondent who had been suspended from the practice of law, continued to practice law and refused to comply with court orders to turn over his files and was held in contempt of court for this failure.); *Simpson, Bruce D. advs. Attorney Discipline Office*, # 04-014 (March 26, 2007)(imposing a three month

suspension for respondent's failure to comply with Probate Court rules and obligations); *Cormier, B. Michael advs. Joseph Bailey*, # 05-002 (May 20, 2008)(imposing a reprimand for respondent's failure to comply with Superior Court rules when withdrawing from a case.)

215. *In re Wolterbeek's Case*, 152 N.H. 710 (2005) is a case wherein the respondent also violated several of the same Rules as Mr. Miller violated in this case, resulting in Mr. Wolterbeek's disbarment. In that case, the respondent violated Rule 1.7(b) by failing to avoid conflicts of interest and failing to obtain his client's informed consent. He violated Rule 1.8(a) by acquiring three mortgages and becoming a holder of notes owed by his client. He violated Rule 3.3(a)(1) by intentionally deceiving the bankruptcy court in submitting materially misleading responses to questions in a petition. He also violated Rule 8.4(c) by deceiving his client and the bankruptcy court for his own personal gain. *Id.* at 717. The Court noted that the multiple offenses constituted a premeditated scheme to deceive his client and the bankruptcy court in order to acquire property. *Id.* The parties agree that the current case is distinguishable from *Wolterbeek's Case*, in that while Mr. Miller knowingly failed to recognize conflicts of interest and his duties to the members of LRG, there is no evidence here that Mr. Miller undertook a premeditated scheme. Supporting considerations include the fact that it was Mr. Johnston who suggested giving Mr. Miller a 5% interest in LRG and Mr. Johnston who decided split the profits from the sale to Torguson Gaming

with Mr. Miller. As such, a suspension is the more appropriate sanction for Mr. Miller's conduct.

216. For all of these reasons discussed above, the parties request that the Hearing Panel recommend a one year suspension to the Professional Conduct Committee.

### **F. Costs**

217. Subject to the Supreme Court's approval of this Stipulation, Mr. Miller 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. Miller.

### **G. Effect of Stipulation**

218. Mr. Miller understands that this stipulation represents a recommended disposition, and that the Hearing Panel ("Panel") may accept, reject, or conditionally accept the stipulation, pursuant to Rule 37A (III)(aa).
219. Mr. Miller acknowledges that the admissions of misconduct and the proposed disposition contained in this Stipulation are freely, knowingly, and voluntarily submitted; 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; that he is fully aware of the consequences of the Stipulation; and that he has been represented by counsel in reaching this Stipulation.

220. Mr. Miller knowingly and intelligently waives his right to a hearing.

Respectfully submitted,

Dated: 10-7 2015

\_\_\_\_\_  
Jeremey A. Miller, Esquire  
Respondent

Dated: 10/8 2015

\_\_\_\_\_  
Elizabeth M. Murphy  
Assistant Disciplinary Counsel



# The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

David J. Johnston & David Johnston Development, LLC

v.

Lakes Region Gaming, LLC, Christopher G. Gistis,  
Glenn M. Gistis, Lawrence N. Kasser

v.

Jeremey A. Miller, Esq., Counterclaim Respondent

NO. 217-2006-EQ-112

## ORDER

This dispute arises from a failed attempt to purchase Lakes Region Greyhound Track. The present action began when David Johnston Development, LLC ("Johnston Development"), and David J. Johnston, individually ("Johnston"), brought an equity action against Lakes Region Gaming, LLC ("Lakes Gaming") and several of its members, including Christopher Gistis, Glenn Gistis, and Lawrence N. Kasser ("Kasser").<sup>1</sup> Johnston Development is also a member of Lakes Gaming. Johnston is Johnston Development's managing member.

### I

The procedural history is complex. On February 17, 2006, Lakes Gaming, Christopher Gistis, Glen Gistis, and Kasser (collectively "Lakes Gaming parties") filed a demand for arbitration against Johnston and Johnston Development. The Lakes Gaming parties asserted that Johnston and Johnston Development "breached fiduciary obliga-

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<sup>1</sup>The respondents and third-party plaintiffs will be referred to collectively as the "Lakes Gaming parties."

tions to, and defrauded, them in selling, for their own benefit, the right to purchase the race[track], a right which belong[ed] to [Lakes Gaming]." Johnston and Johnston Development then sought declaratory judgment in this Court that they were not bound to arbitrate, as the claim fell "outside the scope" of the arbitration clause. The Lakes Gaming parties counter-claimed and asserted the following causes of action: (1) breach of the Lakes Gaming Operating Agreement; (2) request for an accounting and constructive trust; (3) breach of fiduciary duties; (4) fraud; (5) unjust enrichment; (6) promissory estoppel; and (7) enhanced compensatory damages. Subsequently, the Lakes Gaming parties added a claim of loss of arbitration fees.

On March 25, 2008, the Lakes Gaming parties filed a third-party claim against Miller. The third-party complaint alleged all of the same counts as the counter-claim against Johnston and Johnston Development, with the exception of the request for arbitration fees and promissory estoppel. On December 30, 2009, the Lakes Gaming parties moved for entry of default judgment against Johnston and Johnston Development. Johnston and Johnston Development did not respond or object, and the Court granted the default judgment. Consequently, the case moved forward against Miller.

The Court held a bench trial on this matter on January 26 and January 27, 2011. The Court heard testimony from Christopher Gistis, Daniel Luker, Ronald Cook, and Jeremy Miller. The Court also received several exhibits. Following the close of evidence, the parties submitted post-trial memoranda. Based on the evidence provided, the Court finds the following facts.

## II

Christopher Gistis is an experienced businessman who has operated a number of

hotels in New England. In 2005, he received a telephone call from Johnston about purchasing a greyhound race track in Laconia, New Hampshire ("race track"). Johnston and Christopher Gistis had previously participated together in multiple business ventures. Johnston told him that the race track was being sold through a court approved bidding process and there would be an opportunity to buy it at a discount. Johnston also stated that he had learned about the transaction from Miller, who had been his attorney. Miller had learned of the sale from Attorney Ronald Cook, who was representing the seller of the race track. After considering the proposal, Christopher Gistis notified Johnston that he was interested in the purchase. Thereafter, Christopher Gistis and Johnston agreed to purchase the race track together. Johnston had no funds with which to purchase the race track, and looked to Gistis to provide funding. On April 6, 2005, the Belknap Superior Court identified "Johnston Development, LLC" as a "qualified bidder" of the race track. Only qualified bidders were eligible to bid on the race track without posting a \$100,000 letter of credit.

An initial bid of 3.3 million dollars was submitted by Johnston Development at the suggestion of Miller who, after talking to Cook, believed that was the minimum the sellers would accept. Both Christopher Gistis and Johnston agreed that Johnston Development would be the "qualified bidder" of the race track, but that Gistis would provide 5% of the purchase price, which was required as a deposit. On April 18, 2005, Johnston Development, as a qualified bidder, entered a supplemental bid of \$4,101,002.00. Ultimately, the bid was accepted.

The seller, New Hampshire Gaming, L.P., which was represented by Attorney Ronald Cook, required that 5 % of the sale price, approximately \$205,000.00, be depos-

ited in an escrow account in order to hold the bid and proceed with the purchase. On April 18, 2005, Christopher Gistis agreed to wire money from his personal account into Attorney Cook's escrow account.

On April 27, 2005, Lakes Region Gaming, LLC, was formed, with the stated purpose "to own and operate a greyhound racing and pari-mutual facility, as well as other activities allowed for under the law." On April 28, 2005, Preti Flaherty agreed to represent Lakes Gaming in its purchase of the race track. On April 28, 2005, Attorney Dan Luker of Preti Flaherty e-mailed Glen and Chris Gistis and Johnston and advised them that they would need to submit an application for a license to the pari-mutual commission. The next day, on April 29, 2005, he sent another e-mail to them recognizing the owner of the race track would be Lakes Gaming but the owner of the bid rights was Johnston Development. He sent a draft assignment of Johnston Development's bid rights to Glen and Chris Gistis and Johnston and advised them that a "fully executed copy of something along the lines of the attached will need to be provided to the PMC (along with a cover letter confirming that Johnston Development bid was submitted on behalf of Chris and David as already reported everywhere, and that the principals of Lakes Gaming are the same) when the license application is submitted under the name of LRG." (Ex. 9.) Later that morning, after talking to Cook, he sent another e-mail stating:

In thinking further about the closing vs. the license application, and mindful that the application will be a public document, and that there are others out there that might want to derail this, and given the express language of the Court's order, it might be better to hold off on the assignment and simply make [Johnston Development] a member of [Lakes Gaming] so we can proceed to closing with the Court approved entity. Let's talk.

(Ex. 9.)

Miller was aware of these discussions; he sent an e-mail to Glenn Gistis on the same day after "more brainstorming" suggesting another way to form the LLC, which included Johnston LLC as a member of Lakes Gaming. (Ex. 8.) Johnston Development did become a member of Lakes Gaming.

The purchase and sales agreement between New Hampshire Gaming and Johnston Development, which they entered into on May 19, 2005, provided that Johnston Development would have approximately two months to conduct its due diligence in evaluating whether it wanted to close on the transaction. The due diligence period would end on July 18, 2005. At that point, Johnston Development would either need to proceed with the purchase of the race track or notify New Hampshire Gaming that it would not proceed with the transaction. If it failed to notify New Hampshire Gaming of its decision by the July 18, 2005 deadline, the deposit would be lost.

Although the Gistises and Johnston Development were the only members of Lakes Gaming at the beginning, eventually two other members were added: Kasser and Miller. The members' interests in Lakes Gaming were ultimately as follows:

Lawrence Kasser:	40 voting units
Christopher Gistis:	20 voting units
Glenn Gistis:	20 voting units
Johnston Development:	15 voting units
Jeremey Miller:	5 voting units

During the early part of the due diligence period, Christopher Gistis met with the New Hampshire Attorney General's office regarding the purchase. On May 2, 2005, a license application was submitted to the pari-mutual commission signed by Johnston, and drafted by Miller, who also witnessed Johnston's signature, on behalf of Lakes Gaming. The application stated that:

These premises are in the process of being purchased by the applicant by way of **a purchase and sales agreement between NH Gaming Association and the applicant**. After such purchase is completed, the applicant will have sole ownership and control over the premises, facilities and all financial rights and obligations.

(Ex. 10, p. 110) (emphasis added). At all times, unbeknownst to Gistis, Miller was acting as Johnston's counsel.

Because gambling is a highly regulated area, Christopher Gistis hired and paid a lobbyist, Rick Newman. On June 13, 2005, Newman e-mailed Johnston, the Gistises, Kasser and Miller and stated he had noticed that the purchase and sale agreement listed only "Johnston Development" as the purchaser, while an application filed with the Pari-Mutual Commission (PMC)<sup>2</sup> for a license was filed by "Lakes Gaming." (Ex. 15.) He asked "[i]s there an assignment in existence? If so we need to get that to the the Pari Mutual Commission ASAP." (Id.) The same day, Christopher Gistis explained the parties' agreement by sending a letter to the PMC which provided, in part, "At the time of closing on the [race track], the deed and all assets will be conveyed to Lakes Region Gaming, LLC[,] not to Johnston Development, LLC." (Ex. 16.) Additionally, Counsel for Lakes Gaming, Daniel Luker, explained the agreement of the parties in a June 14, 2005 letter to the PMC:

**As a member of [Lakes Gaming], Johnston has agreed to contribute its bid rights to the company, as part of the capitalization of [Lakes Gaming].** To the extent that any documentation of that transfer is necessary, it will be reflected in the records and capital accounting of [Lakes Gaming]. If the [PMC] requires further confirmation or a [Lakes Gaming] certification to that effect, please let us know.

(Ex. 17.) (emphasis added). Miller was copied on this letter. (Ex. 17.)

The transaction to purchase the race track never closed. In June 2005, the Attor-

ney General's Office indicted a dozen people involved with the race track. Some of those indicted had been "heavy betters" at the race track. This caused Christopher Gistis to reassess his decision to purchase the race track. After analyzing the indictments, Christopher Gistis became concerned that the business was not as profitable as he had once thought but was instead a money laundering operation for criminals. As a result, all of the Lakes Gaming members reevaluated the transaction.

The parties decided to try to sell the purchase rights. Gistis expected Johnston to take the lead in doing so, since he had been involved in putting together the deal. The parties wanted to sell the purchase rights and make a profit, or otherwise recoup their expenses. If they did make a profit, it would be split by Lakes Gaming according to each member's interest. To give the parties more time to sell the bid rights, on June 28, 2005, Attorney Luker formally requested a 30-day extension to the July 18, 2005 end date from the seller, because on July 18, 2005, the deposit would become non-refundable. Attorney Cook denied that request. On June 28, 2005, Miller drafted a letter to be signed by Christopher Gistis, which requested that the PMC "table [the] 2005 and 2006 license applications and take no further action on such until further notice."

On or about July 4, 2005, Chris Gistis received a call from a man named Bill McLaughlin who had been an unsuccessful bidder for the race track. McLaughlin said he had been unable to reach Johnston, that he was interested in buying the track, and warned Gistis that Johnston was trying to "make an end run" and sell the purchase and sale rights without him. Concerned, Gistis called Johnston who assured him that their friendship was more important than money and he would not sell the purchase and sale

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<sup>2</sup> The PMC is responsible for regulating horse and dog racing in New Hampshire. See RSA 284.

agreement without notifying him. Gistis heard nothing further from Johnston about any sale, and as the date for closing approached, he sought assurance that his deposit would not be lost. In response to a July 15, 2005 letter drafted by Miller, Cook sent Johnston a letter of July 15, 2010, which stated that when the option expired, the \$205,000 deposit would be returned to Johnston. Miller faxed that letter to Gistis.

Unbeknownst to Christopher Gistis, Glenn Gistis or Kasser, Johnston and Miller had been negotiating with a number of other potential buyers. They began negotiating with one of the unsuccessful bidders, Marlin Torguson on July 5, 2005, and arranged to sell the property to Torguson Gaming Group, Inc., of Bay St. Louis, Mississippi. Torguson was an investor in gaming operations. On July 17, 2005, Torguson agreed to pay \$5,000,000.00 for Johnston Development's right to purchase the race track for \$4,101,002.00. This resulted in a net profit of \$898,998.00. The agreement also provided that if necessary approvals were obtained from governmental authorities authorizing the race track to operate slot machines within two years following the purchase, Torguson would pay Johnston \$7,500,000.00 or, if such approvals were obtained after two years following the purchase but within twelve years, \$5,000,000.00.

During this time, Christopher Gistis's \$205,051.00 remained in escrow holding the purchase rights. On July 18, 2005, which was the due diligence period's end date, Johnston reached a deal with Attorney Cook to extend the end date approximately one week to July 25, 2005, for a payment of \$50,000. (Ex. 33.) The \$50,000 actually came from Miller. The \$50,000.00 would be non-refundable, and the \$205,051.00 would remain in Attorney Cook's escrow account until July 25, 2005. Thus, as of July 18, 2005, Johnston had not returned Christopher Gistis's money, despite his request for its

return, and despite the fact that, as far as Gistis knew, the option date had expired.

On July 18, 2005, in order to bind Torguson to replace the \$205,000 bid rights deposit, Torguson entered into a promissory note in favor of Johnston Development. The note was drafted by Miller. The note provided that "for value received, Torguson...promises to pay to Johnston Development, LLC...the sum of two hundred five thousand and fifty-one dollars...." Payment was due on the note the following day. As scheduled, on July 19, 2005, Torguson transferred \$205,000.00 into Attorney Cook's escrow account to replace Christopher Gistis's \$205,051.00. Thereafter, \$205,000.00 was transferred by wire to Christopher Gistis. In essence, Johnston had continued to withhold Christopher Gistis's money in Attorney Cook's escrow account until Torguson could replace it. Ultimately, Johnston Development closed with Torguson. Johnston Development received \$898,998.00. Thereafter, Johnston gave \$445,000 to Miller, returned the \$50,000 Miller had loaned him, and retained the rest of the profits for himself.

Miller testified that he believed that as of late June 2005, Gistis and the other members of Lakes Gaming were no longer interested in proceeding, but just wanted their money back. He testified that he considered the \$205,000 in Attorney Cook's trust account to be Johnston's money because he believed it was a loan to Johnston from Gistis, and he "didn't know" the nature of the transaction between them. He testified that he thought that he had no duty to the LLC because "it was just a shell," and Johnston owned the purchase and sale agreement rights. He testified that although he had drafted and signed the application to the PMC for a license on behalf of Lakes Gaming, supra, which identified the buyer as Lakes Gaming and not Johnston Development, he

“meant” there was a deal between Johnston Development and the seller. He also testified that he “should have been [clearer].” The Court does not credit any of this testimony.

### III

The Lakes Gaming parties assert that Miller is bound by the facts alleged in Lakes Gaming’s motion for entry of final default against Johnston and Johnston Development. They maintain that because Miller had an opportunity to object to the facts alleged in the motion and because he failed to do so, he is estopped from challenging those facts at trial. Miller argues that because the issues were never actually heard on the merits, they are not entitled to preclusive effect. The Court agrees with Miller.

“For collateral estoppel to apply, three basic conditions must be satisfied: (1) the issue subject to estoppel must be identical in each action; (2) the first action must have resolved the issue finally and on the merits; and (3) the party to be estopped must have appeared as a party in the first action.” Stewart v. Bader, 154 N.H. 75, 80-81 (2006) (quotation omitted). “These conditions must be understood, in turn, as particular elements of the more general requirement[] that a party against whom estoppel is pleaded must have had a full and fair prior opportunity to litigate the issue or fact in question.” Id. (quotation omitted).

The Lakes Gaming parties’ collateral estoppel argument suffers from two fatal flaws. First, the test for collateral estoppel presupposes a *prior* opportunity to litigate the issue. See id. Miller was neither a co-defendant nor in privity with a defendant in a prior action where the current issues were litigated. The fact that Miller may have had “an opportunity to be heard” on another party’s default judgment in the present case,

See Super. Ct. R. 75, is not the same as having a prior opportunity to litigate. If that were true, in any case where a default occurred, any co-defendant would find himself litigating all of the factual issues before trial. Second, the Lakes Gaming parties cannot satisfy the second prong of the collateral estoppel test: that the issues were litigated "finally and on the merits." Where a default judgment is entered, none of the issues are actually litigated. Marston v. U.S. Fidelity and Guaranty Co., 135 N.H. 706, 710 (1992). As a result, the Lakes Gaming parties' collateral estoppel argument fails. The Court now considers the merits.

#### IV

The Lakes Gaming parties contend that Miller breached the LLC Operating Agreement by assigning Lakes Gaming's race track purchase and sale agreement rights to Torguson without obtaining the seventy percent vote of the members necessary to authorize the sale of "substantially all of Lakes Gaming's assets." As a result of the breach, the Lakes Gaming parties seek \$898,998.00, which equals the amount received from the sale to Torguson. Miller argues that because the bid rights were at all times in Johnston Development's name, no vote was necessary to authorize the sale of the bid rights.

This issue turns on whether the Purchase and Sale Agreement rights belonged to Johnston Development or Lakes Gaming at the time Johnston sold them to Torguson. While it is true that the purchase and sale rights had not been transferred to Lakes Gaming, the reason for not transferring the rights was to avoid potential litigation in the Belknap County Superior Court, which could delay acceptance of Johnston's bid. The P&S was negotiated by Attorney Luker, Lakes Gaming's counsel, and members of Lakes

Gaming paid for his work. The documents are replete with statements such as Attorney Luker's April 29, 2005 e-mail, which show that the parties believed that the purchase and sale agreement was an asset of Lakes Gaming. There is no evidence Johnston ever disputed that understanding. Further, Johnston had an obligation to transfer his rights at closing, which Lakes Gaming could have enforced if he refused to do so. At the very least, at the time that Johnston was negotiating with Torguson for sale of the purchase rights, Lakes Gaming had a cause of action for specific performance to require transfer of those rights so that the closing could take place.

Even with that understanding, the issue of whether the sale of inchoate rights required a seventy percent vote is a difficult one. However, as a practical matter, this issue is of little moment because the Court finds that Miller breached his fiduciary obligations to the Lakes Gaming parties.

Under their third count, the Lakes Gaming parties assert that Miller breached fiduciary obligations of good faith and loyalty to them and to the LLC when he assisted Johnston and Johnston Development in selling the purchase rights to Torguson. Neither RSA 304-C nor the parties' Operating Agreement define the fiduciary obligations of members in a manager-managed limited liability company. This does not, however, mean that members are free from any fiduciary obligations to one another. Instead, the matter is left to the common law. See RSA 304-C:79 ("In any case not provided for in this chapter, the rules of law and equity, including the law of merchant, shall govern.").

The New Hampshire Supreme Court has never specifically defined the fiduciary duties owed by the members of an LLC in the absence of language provided for in the operating agreement. However, the courts that have done so appear to agree that the

fiduciary obligations owed among members in an LLC are the very same fiduciary duties owed among partners in a partnership. See, e.g., Blair v. McDonagh, 894 N.E.2d 377, 387 (Ohio Ct. App. 2008) (“[A] limited-liability company, like a partnership, involves a fiduciary relationship...that imposes on the members a duty to exercise the utmost good faith and honesty in all dealings and transactions related to the company.”); see also, e.g., Willoughby Rehab. And Health Care Ctr., LLC, v. Webster, 13 Misc.3d 1230 (N.Y. 2008) (“A limited liability company is [a] hybrid business entity having attributes of both a corporation and a partnership....The acts of working in concert and managing a limited liability company clearly give rise to a relationship among members which is analogous to that of partners.”). Thus, in order to determine what fiduciary duties Miller owed to his fellow members, the Court must look to the fiduciary relationships among partners.

“Judge Cardozo memorably described the fiduciary duty partners owe one another: ‘Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’” Waite v. Sylvester, 131 N.H. 663 (1989) (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)). Furthermore, “copartners...owe to one another, while the enterprise continues, the duty of the finest loyalty.” Meinhard, 164 N.E. at 546. “The standard of loyalty has no fixed scale.” Guth v. Loft, 5 A.2d 503, 510 (Del. Ch. 1939). In the corporate context, courts have held that the duty of loyalty demands of an officer or director

the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers.

Id. Moreover, “[t]he rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy....” Id. This rule is known as the “Corporate Opportunity Doctrine.” Id. However, because the doctrine stems from the fiduciary duty of loyalty and not merely from any special relationship between a corporation and its officers and directors, the principle behind the rule applies with equal force to partnerships and limited liability companies. See, e.g., Demoulas v. Demoulas Supermarkets, Inc., 677 N.E.2d 159, 180 (Mass. 1997) (public policy underlying the corporate opportunity doctrine applies to partnerships).

With the above standard in mind, the evidence demonstrates that Miller breached his duties of good faith and loyalty to the LLC and its members. Miller knew that Johnston was using Christopher Gistis’s money in order to sell the purchase and sale agreement, or “flip the deal.” In fact, Miller drafted the promissory note to Torguson that “lent” Gistis’s money to Torguson until he could provide his own deposit to Attorney Cook the following day. Moreover, Miller knew of the joint venture between Johnston and Christopher Gistis, which preceded the creation of the LLC. He also knew of the stated purpose of the LLC, which was to own and operate the race track. This required Miller to at least inform his fellow members of opportunities gained as a result of that relationship, especially an opportunity made possible because of a fellow member’s own funds.

Miller testified at trial that he believed Christopher Gistis’s deposit was a “loan” to Johnston so that he could purchase the race track. However, such a contention is not credible. Miller knew that Christopher Gistis originally deposited the money so that he

could be a part of the race track purchase. Additionally, Miller knew that Christopher Gistis continued to leave the money in the escrow account for the purpose of purchasing the race track for the entire LLC and its members, which included Miller, or selling the P&S so the parties could recover their expenses and perhaps even make a profit. As a result, so long as the money remained in the escrow account, it was only to be used for the benefit of the LLC, and Miller, as a member of the LLC, had a duty not to use it as an asset so that he could profit from the opportunity that belonged to the LLC. Because he did so knowingly and did not inform his fellow members of the opportunity to sell the purchase and sale agreement, he breached his duty of loyalty and good faith.

## V

In its fourth claim for relief, the Lakes Gaming parties allege that Miller was fraudulent in failing to disclose to them several material facts: (1) that he assigned the purchase rights to the race track; (2) that he profited substantially from that assignment, to the exclusion of the fellow members of the LLC; and (3) that he was not acting solely as a member of Lakes Gaming, but rather as Johnston Development's attorney.<sup>3</sup> "The party seeking to prove fraud must establish that the other party made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it." Van Der Stok v. Van Voorhees, 151 N.H. 679, 682 (2005). Also, "a fraud may be committed by the omission to disclose a material fact under some circumstances." Benoit v. Perkins, 79 N.H. 11, 15 (1918). The plaintiff must demonstrate fraud by clear and convincing evidence. Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363, 369 (2009).

---

<sup>3</sup> The Lakes Gaming parties have alleged actual fraud and not constructive fraud. See Lakes Gaming par-

The primary fraud alleged by the Lakes Gaming parties relates to Miller's failure to inform them of the fact that he and Johnston were "flipping the deal." In essence, the Lakes Gaming parties allege that Miller knew the other members wanted to flip the deal and that he fraudulently concealed the fact that he was independently seeking other buyers.

While demonstrating deceitful or reckless intent is not necessary to succeed on a breach of fiduciary duty claim, proof of actual fraud requires such a showing. Compare Miami Subs Corp. v. Murray Family Trust, 142 N.H. 501, 514-15 (1997) (to demonstrate a breach of a fiduciary obligation, conduct need only be sufficiently contrary to the interests of the partnership), with Van Der Stok, 151 N.H. at 682, and Syracuse Knitting Co. v. Blanchard, 69 N.H. 447 (1899) (finding that fraud requires intent). Although Miller's membership in the joint venture and Lakes Gaming imposed fiduciary obligations on him and prohibited him from using opportunities belonging to his fellow joint venturers and Lakes Gaming members for his own benefit, his misunderstandings and ignorance of the law and his obligations under it may well have led him to believe that his conduct was lawful.

The same reasoning applies to the Lakes Gaming parties' theory of fraud based on Miller's actions as an attorney for Johnston and Johnston Development. Miller plainly violated his fiduciary obligations to Lakes Gaming and its members by acting as counsel to Johnston, but his actions were not necessarily fraudulent. Ironically, in his post hearing memorandum, Miller argues that he was constrained in communications with fellow members of Lakes Gaming by the fact of his attorney-client obligations toward Johns-

---

ties' post-trial memorandum, at 14 (citing Patch v. Arsenault, 139 N.H. 313, 319 (1995)).

ton:

Miller was never asked anything about Johnston's dealings regarding his bid rights. Furthermore, as legal counsel to Johnston, as Johnston was working outside on a project outside the LLC it would have been unethical, and actionable by Johnston should it have occurred for Miller to discuss Johnston's legal matters with *anyone*.

(Miller's Post-trial Mem., at 7.)

While Miller apparently believes this fact is exculpatory, the Court believes it is damning and conclusively establishes his breach of fiduciary duties to his fellow members and the LLC. As a member of Lakes Gaming, Miller had a fiduciary obligation to disclose information to it and to its members that would cause it to act or refrain from acting. Fraud requires intent to deceive or reckless indifference to a statement's truth. Van Der Stok, 151 N.H. at 682. However, mere ignorance, no matter how gross, is insufficient to establish fraud. While the issue is a close one, the Lakes Gaming parties have not proved fraud by clear and convincing evidence.

Finally, the Lakes Gaming parties allege unjust enrichment. However, this Court is without equity jurisdiction when there exists "a plain, adequate[,] and complete remedy at law." N.H. RSA 498:1. Here, the Lakes Gaming parties have succeeded on their breach of fiduciary duties claim. As a result, their claim for unjust enrichment fails as a matter of law.

## VI

In sum, Miller is liable for breaching his duty of good faith and loyalty to the Lakes Gaming parties by appropriating an opportunity which belonged to the LLC using property of the LLC, the \$205,051.00, which was being held for the purpose of owning the race track, failing to inform the Lakes Gaming Parties of a corporate opportunity and

appropriating that opportunity for himself. Where one profits as a result of a breach of loyalty, courts generally require him to disgorge all of the profits obtained. See, e.g., Triton Const. Co. Inc. v. Easternshore Elec. Services, Inc., 2009 WL 1387115, \*28 (Del. Ch. 2009) (finding that all profits from a breach of a fiduciary duty should be disgorged); see also generally In re Guardianship of Dorson, 156 N.H. 382, 387 (2007). Moreover, where two parties aid and abet one another in breaching fiduciary obligations, they are liable jointly and severally. See Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 173 (Del. 2002). Therefore, Johnston, Johnston Development, and Miller are jointly and severally liable to Lakes Gaming and its members (the Lakes Gaming parties) for \$898,998.

The Lakes Gaming parties also allege that they are entitled to “enhanced compensatory damages” based on Miller’s “wanton, malicious, and oppressive” behavior.

However, the damages in this case are essentially economic damages. The requisites for enhanced compensatory damages, which are injury to the “wounded feelings from the insult, degradation[,] and other aggravating circumstances attending the act,” Kimball v. Holmes, 60 N.H. 163, 164 (1880), do not exist. Therefore, the Lakes Gaming parties are not entitled to enhanced damages.

The Lakes Gaming parties also contend that they are entitled to expenses and fees pursuant to RSA 304-C:76, III, which provides, “If an action brought pursuant to [this section] is successful[,]...the court may award the plaintiff reasonable expenses, including reasonable attorney’s fees, from any recovery in any such action or from the limited liability company.” Because of the blatant breach of fiduciary duty, resulting in the expense incurred by the Lakes Gaming parties in litigation that should have been unneces-

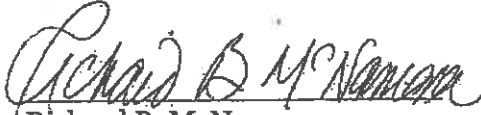
sary, the Court finds that an award of fees and expenses against Miller is proper.

Keenan v. Fearon, 130 N.H. 494, 502 (1988).

The Requests for Findings of Facts and Rulings of Law submitted are granted or denied to the extent consistent or inconsistent with this Order. Harrington v. Town of Warner, 152 N.H. 74, 85-86 (2005).

**SO ORDERED.**

4/1/11  
DATE

  
Richard B. McNamara,  
Presiding Justice



NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.courts.state.nh.us/supreme>.

THE SUPREME COURT OF NEW HAMPSHIRE

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Merrimack  
No. 2011-394

LAKES REGION GAMING & a.

v.

JEREMEY MILLER

Argued: January 10, 2013  
Opinion Issued: February 13, 2013

Orr & Reno, P.A., of Concord (Jeffrey C. Spear on the brief and orally), for the plaintiffs.

Steiner Law Offices, PLLC, of Concord (R. James Steiner on the brief and orally), for the defendant.

DALIANIS, C.J. The defendant, Jeremy Miller, appeals the Superior Court's (McNamara, J.) order finding in favor of the plaintiffs, Lakes Region Gaming, LLC (Lakes Region Gaming) and three of its members – Christopher G. Gistis, his son (Glenn M. Gistis), and Lawrence N. Kasser – on their claim that Miller breached his fiduciary duties to them. We affirm.

The trial court found, or the record supports, the following facts. In 2005, Christopher Gistis agreed with David J. Johnston to purchase the Lakes

Region Greyhound Park in Laconia through a court-approved bidding process. Gistis and Johnston formed a joint venture pursuant to which Johnston's development company, David Johnston Development LLC (Johnston Development), would bid on the race track, and Gistis would provide the requisite deposit. On April 18, 2005, Johnston Development successfully bid \$4,101,002 to purchase the race track. In connection with the bid, Gistis wired a deposit of approximately \$205,000 to the escrow account of the seller's attorney.

Approximately nine days later, Johnston Development and Gistis formed Lakes Region Gaming in order to "own and manage the premises known as 'Lakes Region Greyhound Park' and to engage in any and all activities related or incidental thereto." The other members of Lakes Region Gaming were: Glenn Gistis, Kasser, and Miller. The parties agreed that Johnston Development would contribute its right to purchase the race track to Lakes Region Gaming as part of the capitalization of the company, and that Lakes Region Gaming would own the track.

On May 19, 2005, Johnston Development and the seller entered into a purchase and sale agreement for the race track that gave Johnston Development until July 18, 2005, to conduct due diligence. If Johnston Development failed to notify the seller by July 18 as to whether it intended to proceed with the transaction, the \$205,000 deposit would be forfeited.

The transaction to purchase the race track never closed because, in June 2005, a New Hampshire grand jury indicted a dozen people involved with the track, which caused the members of Lakes Region Gaming to reconsider the purchase decision. The members decided to try to sell the right to purchase the race track so that they could recoup their expenses or make a profit. If a profit were realized, it would be split according to each member's interest in the company.

Unbeknownst to the plaintiffs, Miller and Johnston had been negotiating the right to purchase the race track with a number of potential buyers. As a result of these negotiations, on July 17, 2005, Torguson Gaming Group, Inc. (Torguson) agreed with Johnston to pay \$5,000,000 for the right to purchase the race track for \$4,101,002, resulting in a net profit of \$898,998.

Also unbeknownst to the plaintiffs, on July 18, Johnston agreed with the seller's attorney to extend the due diligence period until July 25, in exchange for Miller paying the attorney \$50,000. Under this agreement, the \$50,000 would be non-refundable, and the \$205,000 deposit would remain in the attorney's escrow account until July 25.

In another agreement of which the plaintiffs were not aware, also entered into on July 18, Torguson agreed, in effect, to replace the \$205,000 held in the seller's attorney's escrow account. On July 19, Torguson transferred the money to the escrow account and, thereafter, the seller's attorney transferred \$205,000 to Gistis.

Ultimately Torguson paid Johnston Development \$898,998 for the right to purchase the race track, of which Johnston transferred \$445,000 to Miller.

Eventually, the plaintiffs brought claims against Johnston, Johnston Development, and Miller, alleging, among other things, breach of fiduciary duty. The plaintiffs ultimately obtained a default judgment against Johnston and Johnston Development, and the claim against Miller proceeded to trial.

Following a bench trial, the trial court found that Miller breached his fiduciary duties to the plaintiffs by using the \$205,000 deposit from Gistis, which belonged to Lakes Region Gaming and "which was being held for the purpose of owning the race track," in order to appropriate for himself the opportunity to sell the purchase rights to Torguson. The trial court ruled that Miller was jointly and severally liable with Johnston and Johnston Development for damages in the amount of \$898,998, and ordered him to pay the plaintiffs' attorney's fees and costs. See RSA 304-C:76, III (2005) (amended 2012).

Miller unsuccessfully moved to reconsider the trial court's decision, arguing that: (1) he did not owe a fiduciary duty to the plaintiffs because Lakes Region Gaming "had abandoned [its] contemplated dealings"; and (2) the trial court's order failed to consider paragraph ten of Lakes Region Gaming's operating agreement. This appeal followed.

Miller first argues that the trial court erroneously ruled that he had a fiduciary duty to the plaintiffs when he was only a minority member of Lakes Region Gaming. However, the record does not reflect, and Miller has not pointed to, any evidence that he made this argument in the trial court. See Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 69 (2012). It is the burden of the appealing party, here Miller, to provide this court with a record sufficient to demonstrate that the issues on appeal have been raised before the trial court. See id. Because Miller has not demonstrated that he preserved this argument for our review, we decline to address it. See id. at 69-70.

We likewise decline to address Miller's argument that the trial court erred when it found him jointly and severally liable for the damages in this case. As with the first argument, Miller has failed to demonstrate that he raised this argument in the trial court, and it, too, is not preserved for our review. See id. at 69-70.

Miller next contends that the trial court erred when it ruled in favor of the plaintiffs because, he claims, the assets at issue, the right to purchase the race track for approximately \$4 million and the \$205,000 deposit, did not belong to Lakes Region Gaming, and, therefore, the plaintiffs lacked standing to bring an action based upon them. Although Miller did not raise this argument in the trial court, because it questions the trial court's subject matter jurisdiction, we address it. See Baines v. N.H. Senate President, 152 N.H. 124, 128 (2005) (we will review subject matter jurisdiction claims, even if raised for the first time on appeal); In re Guardianship of Williams, 159 N.H. 318, 323 (2009) (whether party has standing presents question of subject matter jurisdiction).

Contrary to Miller's assertions, the trial court, in fact, found that both the right to purchase the race track and the escrowed deposit belonged to Lakes Region Gaming. The court found that "Johnston had an obligation to transfer his rights at closing, which Lakes [Region] Gaming could have enforced if he refused to do so." Accordingly, the court found, "[a]t the very least, [when] Johnston was negotiating with Torguson for sale of the purchase rights, Lakes [Region] Gaming had a cause of action for specific performance to require transfer of those rights so that the closing could take place."

The trial court also found that the deposit was held in escrow "for the purpose of purchasing the race track for [Lakes Region Gaming] and its members," or to sell the right to purchase the track "so the parties could recover their expenses and perhaps even make a profit." In short, while in escrow, the deposit "was only to be used for the benefit of [Lakes Region Gaming]."

Although Miller testified that he believed that the right to purchase the race track belonged to Johnston and that the escrowed deposit was merely a "loan" to Johnston, the trial court "[d]id not credit any of this testimony." We defer to the trial court's judgment on such issues as resolving conflicts in testimony, assessing the credibility of witnesses, and determining the weight of the evidence. Cook v. Sullivan, 149 N.H. 774, 780 (2003).

Moreover, Miller has not challenged any of the trial court's factual findings on appeal. Accordingly, Miller's standing argument, which is premised upon a view of the facts that the trial court specifically rejected, is unavailing.

Finally, Miller asserts that the trial court erred when it failed to consider paragraph 10 of Lakes Region Gaming's operating agreement, which provides, in pertinent part:

Nothing in this Agreement will preclude any Member or Manager(s) from engaging in any business or making any other

investment, even though such business or other investment may be in competition with the Company. Any such business or investment may be undertaken with or without notice to or participation therein by the other Members or the Manager(s). Each Member and the Company acknowledge that the conduct described in the preceding two sentences does not constitute a breach of any fiduciary duty by the Member(s) or Manager(s) so engaged. Further, each Member and the Company hereby waive any right or claim he or it may have against the other Members or the Manager(s) with respect to any such activity or the income or profits therefrom.

Miller contends that his conduct cannot be deemed to be a breach of fiduciary duty because it constituted "competition." He explains: "Once the decision had been made not to proceed with the purchase, or any alternative to lead to a closing, capitalization of [Lakes Region Gaming], and an actual transfer of the . . . bid rights [to] [Lakes Region Gaming], any actions taken by any of the members, or one of them, could occur in competition with the interests of the other members." The plaintiffs counter that Miller was not merely competing with Lakes Region Gaming; he and Johnston sold the company's primary business asset – the right to purchase the race track for \$4 million – and then secretly used Gistis's escrow deposit to do so.

Because the operating agreement is a form of contract, we will apply the general rules of contract interpretation. See Robbins v. Salem Radiology, 145 N.H. 415, 417 (2000) (addressing interpretation of partnership agreement). "As a general rule, the proper interpretation of a contract is ultimately a question of law for this court, and we will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons." Id. (quotation omitted).

We agree with the plaintiffs that paragraph 10 did not allow Miller to use Lakes Region Gaming's assets to enrich himself. Miller's argument is premised upon his mistaken assumption that the purchase rights and escrowed deposit did not belong to Lakes Region Gaming. However, the trial court found that both of these assets belonged to Lakes Region Gaming, and given Miller's failure to challenge this finding on appeal, we uphold it.

Although Miller raised other issues in his notice of appeal, he has not briefed them, and, therefore, they are deemed waived. See In re Estate of King, 149 N.H. 226, 230 (2003).

Affirmed.

HICKS and LYNN, JJ., concurred.

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT



Merrimack Superior Court  
163 North Main St./PO Box 2880  
Concord NH 03302-2880

Telephone: (603) 225-5501  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

NOTICE OF DECISION

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FILE COPY

Case Name: David Johnston Development LLC etal v Lakes Region Gaming LL  
Case Number: 217-2006-EQ-00112

Please be advised that on May 30, 2013 Judge McNamara made the following order relative to:

(Proposed) Certificate of Judgment - Approved.

May 31, 2013

William S. McGraw  
Clerk of Court

(484)

C: Jeremey A Miller, ESQ; David Johnston Development, LLC; David J Johnston; Jeffrey C. Spear,  
ESQ

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

DOCKET #06-E-0112

DAVID J. JOHNSTON  
DAVID JOHNSTON DEVELOPMENT, LLC

V.

LAKES REGION GAMING, LLC, CHRISTOPHER G. GISTIS, GLENN M. GISTIS  
LAWRENCE N. KASSER

v.

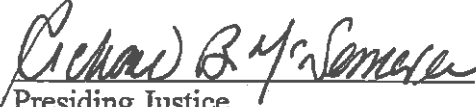
JEREMEY A. MILLER, Counterclaim Respondent

CERTIFICATE OF JUDGMENT

Judgment is awarded in favor of the Respondents, Lakes Region Gaming, LLC, Christopher Gistis, Glenn Gistis and Lawrence Kasser (collectively "LRG"), and against Counterclaim Respondent Jeremey A. Miller, in the amount of \$898,988, plus accrued statutory interest in the amount of \$ 133,070.86, in accordance with the attached order dated April 1, 2011 holding David Johnston, David Johnston Development, LLC and Jeremey Miller jointly and severally liable to LRG and the Court's order dated April 25, 2013 granting judgment against Jeremey Miller.

Judgment rendered April 25, 2013

Certificate issued May 30, 2013

  
Presiding Justice

## STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket #06-E-0112

David J. Johnston  
David Johnston Development, LLC

v.

Lakes Region Gaming, LLC, Christopher G. Gistis, Glenn M. Gistis, and Lawrence N.  
Kasser

v.

Jeremy A. Miller, Counterclaim Respondent

Motion for Contempt Against Jeremy Miller

Respondents Lakes Region Gaming, LLC, Christopher G. Gistis, Glenn M. Gistis, and Lawrence N. Kasser (collectively "LRG") respectfully submit this motion for contempt against Judgment Debtor Jeremy Miller, stating as follows:

1. LRG has a \$1,032,058.86 judgment against Jeremy A. Miller that Mr. Miller has done exactly nothing to satisfy. LRG filed a motion for periodic payments with the Court on June 4, 2013 – over two years ago - in an effort to impose a payment plan. After initially granting LRG's June 4, 2013 motion for periodic payments – and scheduling the hearing – the Court ordered LRG to first conduct asset discovery from Mr. Miller. Order of June 19, 2013.
2. LRG has been attempting to do so, without success, for the past two years. Mr. Miller has done little but obstruct and delay the process, necessitating several motions to compel and three prior motions for contempt.
3. Mr. Miller appeared pursuant to a subpoena *duces tecum* for a deposition in October 2014. The subpoena required him to provide, among other documents, "a current, updated financial affidavit." Affidavit of Jeffrey C. Spear in Support of Fourth

Motion for Contempt, Ex. A (“8/14/15 Spear Affid.”). Such an affidavit is an integral – and in fact a required – component of the periodic payment process. Super. Ct. Rule 51(d).

4. Mr. Miller did not comply in full with this request, bringing only the first page of the affidavit to the deposition. *Id.* at Ex. B. This form was never completed or supplemented, despite many requests.

5. Earlier this year, in response to LRG’s previous motion, the Court held Mr. Miller in contempt and agreed to lift that order only if Mr. Miller produced a variety of overdue documents. Mr. Miller did produce a number of document by the deadline, and the Court lifted the order.

6. But one very important document was missing – a complete, updated Financial Affidavit reflecting Mr. Miller’s current financial picture. LRG cannot feasibly present an argument to the Court regarding Mr. Miller’s ability to make periodic payments on the judgment without the information contained in the affidavit.

7. Mr. Miller’s paralegal acknowledged his obligation provide the affidavit on June 8, 2015 and promised to do so promptly. *Id.* at Ex. C.

8. Despite counsel’s repeated requests since that time, Mr. Miller has not provided the affidavit. *Id.*

WHEREFORE, LRG respectfully request that the Court:

- A. Hold Mr. Miller in contempt of court for his failure to comply with the subpoena *duces tecum* and to provide the financial affidavit required by Super. Ct. Rule 51(d);
- B. Compel him to produce that information; and
- C. Grant such other and further relief as justice requires.

Respectfully submitted,

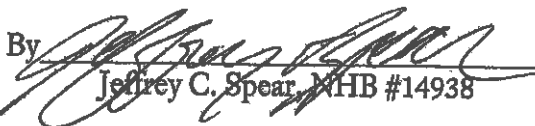
Lakes Region Gaming, LLC,

Christopher G. Gistis, Glenn M. Gistis, and  
Lawrence N. Kasser

By their Attorneys,

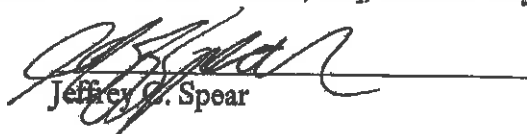
ORR & RENO, P.A.  
One Eagle Square  
P.O. Box 3550  
Concord, NH 03302-3550  
(603) 224-2381

Dated: August 14, 2015

By   
Jeffrey C. Spear, MHB #14938

#### CERTIFICATE OF SERVICE

I, Jeffrey C. Spear, hereby certify that on this 14<sup>th</sup> day of August, 2015, a copy of the foregoing motion was forwarded by first class mail to Rob Waters, Esq, counsel for J. Miller & Associates, PLLC.

  
Jeffrey C. Spear

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket #06-E-0112

David J. Johnston  
David Johnston Development, LLC

v.

Lakes Region Gaming, LLC, Christopher G. Gistis, Glenn M. Gistis, and Lawrence N.  
Kasser

v.

Jeremey A. Miller, Counterclaim Respondent

**Affidavit of Jeffrey C. Spear in Support of LRG's Motion for Contempt  
against Jeremey A. Miller**

I, Jeffrey C. Spear, being first duly sworn, do depose and say as follows:


1. I am counsel for Lakes Region Gaming, LLC, Christopher G. Gistis, Glenn M. Gistis, and Lawrence N. Kasser in this matter, and I have personal knowledge of the facts contained herein.
2. Attached hereto as Exhibit A is a true and correct copy of an August 25, 2014 subpoena *duces tecum* that was served on Jeremey Miller on August 28, 2014.
3. Attached hereto as Exhibit B is a true and correct copy of Miller Deposition Exhibit 3, which was the first page of a financial affidavit. Mr. Miller did not complete the second page.
4. Attached hereto as Exhibit C is a true and correct copy of a series of email communications between June 8 and August 6, 2015 regarding Mr. Miller's failure to provide the financial affidavit.

FURTHER AFFLIANT SAYETH NOT.

  
Jeffrey C. Spear

STATE OF NEW HAMPSHIRE  
COUNTY OF MERRIMACK

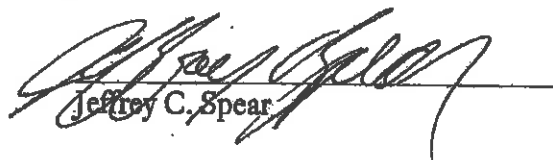
On this 14<sup>th</sup> day of August 2015, personally appeared Jeffrey C. Spear and made oath that the foregoing statements subscribed by him are true and correct to the best of his knowledge and belief.

  
Notary Public  
My commission expires:



**CERTIFICATE OF SERVICE**

I, Jeffrey C. Spear, hereby certify that on this 14<sup>th</sup> August, 2015, a copy of the foregoing Affidavit was forwarded by first class mail to Rob Waters, counsel for Mr. Miller.

  
Jeffrey C. Spear

A

THE STATE OF NEW HAMPSHIRE

David Johnston Development, LLC )  
David J. Johnston )  
v. )

**SUBPOENA DUCES TECUM**

Lakes Region Gaming, LLC )  
Christopher G. Gistis )  
Glenn M. Gistis )  
Lawrence N. Kasser )

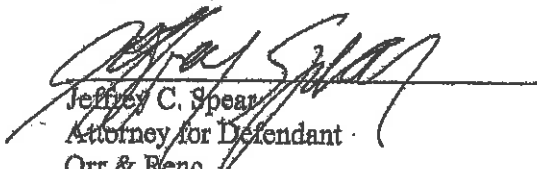
Merrimack County  
Superior Court  
Docket No. 06-E-0112

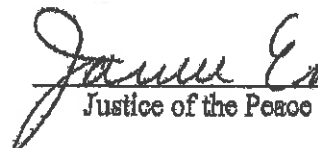
*The State of New Hampshire, to:* Jeremy Miller, Esquire  
J. Miller & Associates, PLLC  
210 North State Street, Suite 2-B  
Concord, New Hampshire 03301

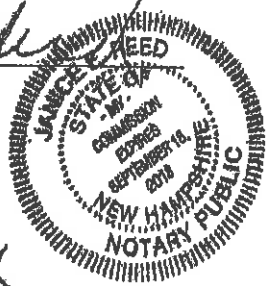
You are hereby commanded to attend and give testimony in the above entitled action, on Friday, September 19, 2014, at 9 a.m., before a court reporter from Bragan Reporters at the offices of Orr & Reno, 45 South Main Street, Concord, New Hampshire, and that you have and bring with you at the same time and place: a current, updated financial affidavit; a current and updated list of creditors; copies of all contracts and agreements underlying or substantiating the debts you claim to owe; and your 2013 federal income tax return.

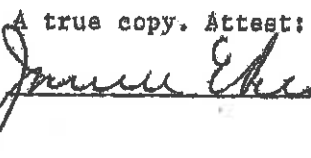
Failure to appear according to the command of this Subpoena will subject you to a penalty, damages in a Civil Suit and punishment for contempt of Court.

Dated at Concord, NH  
August 25, 2014

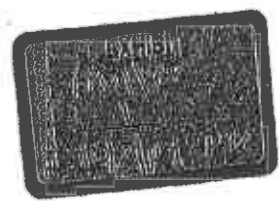
  
Jeffrey C. Spear  
Attorney for Defendant  
Orr & Reno  
45 South Main Street, P.O. Box 3550  
Concord, NH 03302-3550  
(603) 224-2381

  
Justice of the Peace



A true copy. Attest:  


cc: R. James Steiner, Esq.



**PROOF OF SERVICE**

I, \_\_\_\_\_, the undersigned, being over the age of 18, hereby certify that the foregoing subpoena and a witness attendance fee were served upon Jeremy Miller, by serving a true copy of the subpoena in hand to Jeremy Miller on \_\_\_\_\_, 2014, at \_\_\_\_\_ o'clock in the forenoon/afternoon.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: \_\_\_\_\_, 2014 \_\_\_\_\_

Address for Service:

J. Miller & Associates, PLLC  
210 North State Street, Suite 2-B  
Concord, New Hampshire 03301

---

AFFIDAVIT OF SERVICE

MERRIMACK, SS.

08/28/2014

I, DEPUTY ROGER G MATTE, summoned the within named JEREMY MILLER, ESQUIRE, to appear as herein directed by giving in hand to same, a true and attested copy of the within Subpoena, this date, at 10:50am.

FEES

Service	\$25.00
Postage	1.00
Travel	18.00

TOTAL	<u>\$44.00</u>
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DEPUTY ROGER G MATTE  
Merrimack County Sheriff's Office

B

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# The State of New Hampshire

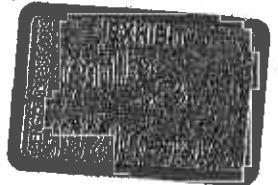
MERRIMACK COUNTY

SUPERIOR COURT

David Johnston Development

v.  
Lilli Ross Goring

Docket No(s) 06 E - 112



## AFFIDAVIT OF ASSETS AND LIABILITIES (PERIODIC PAYMENT HEARINGS)

1. Name: Jeremy Miller
2. Where do you live? 237 Fiskeville Rd Canterbury NH 02826
3. Marital Status: single  single  married  divorced  separated  widowed
4. List the names, ages, relationships of dependents you support:  
Karen Miller - wife 46 Michael Miller - son  
Michael Douglas - son
5. If you are presently employed, state where and for how long:  
J. Miller - Assets, LLC - 11/14 Full-time  Part-time
6. If unemployed, state last date of employment: N/A
7. When do you anticipate new employment? N/A
8. If your spouse is presently employed, state where and for how long?  
Royl Bank of Scotland - 13 years Full-time  Part-time
9. If spouse is unemployed, state last date of employment: N/A
10. List other employed household members and their weekly income: N/A
11. Please state WEEKLY take-home amount:

	Yours	Spouse's
Salary/Wages	\$ <u>542.00</u>	\$ <u>N/A</u>
Pension/Trust benefits	<u>N/A</u>	
Unemployment Compensation	<u>N/A</u>	
Social Security	<u>N/A</u>	
Investment Income	<u>N/A</u>	
Alimony	<u>N/A</u>	
Child Support	<u>N/A</u>	
Welfare Payments	<u>N/A</u>	
Other	<u>N/A</u>	

12. What money is presently available to you?  
Cash on hand: \$ 100  
Checking Account: [Redacted] \$ 200.00  
Savings Account: N/A \$ \_\_\_\_\_  
Name of Account: \_\_\_\_\_  
Stocks/Bonds/IRA/Pension: [Redacted] \$ \_\_\_\_\_

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**Spear, Jeffrey C.**

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**From:** Robert Waters <rwaters@amclegal.com>  
**Sent:** Thursday, August 6, 2015 11:40 AM  
**To:** Spear, Jeffrey C.  
**Cc:** Lynette Dearborn  
**Subject:** Re: Miller and J. Miller & Associates, PLLC

Hi Jeff, I certainly understand and respect your position. I will continue to pass the messages along

On Thu, Aug 6, 2015 at 11:01 AM, Spear, Jeffrey C. <[JSpear@orr-reno.com](mailto:JSpear@orr-reno.com)> wrote:

Lynette and Rob,

If I don't receive a current, fully executed financial affidavit by the end of business on Monday, August 10, 2015, I will file a renewed motion for contempt with the Court.

Experience shows that motions for contempt are the only thing that ever rouses Mr. Miller to fulfill his obligations in discovery.

Please prove me wrong in this instance by providing the affidavit promptly.

Thanks,

Jeff

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**From:** Spear, Jeffrey C.  
**Sent:** Friday, July 24, 2015 3:50 PM  
**To:** 'Lynette Dearborn' <[lynette@millerlawnh.com](mailto:lynette@millerlawnh.com)>  
**Cc:** Robert Waters <[rwaters@amclegal.com](mailto:rwaters@amclegal.com)>  
**Subject:** RE: Miller and J. Miller & Associates, PLLC

Lynette,

I'm checking in again, now for the third time. Please help avoid another trip on the contempt of court carousel by sending the affidavit promptly.

I can't continue Mr. Miller's deposition, or ask the Court for a period payment hearing, without a current version of a financial affidavit.

Jeff

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**From:** Spear, Jeffrey C.  
**Sent:** Monday, July 13, 2015 9:44 AM  
**To:** 'Lynette Dearborn' <[lynette@millerlawnh.com](mailto:lynette@millerlawnh.com)>  
**Cc:** Robert Waters <[rwaters@amclegal.com](mailto:rwaters@amclegal.com)>  
**Subject:** RE: Miller and J. Miller & Associates, PLLC

Lynette,

I haven't received the financial affidavit yet. Have you sent it?

Just to summarize, Mr. Miller brought only the first page of an affidavit to the deposition last fall. He's never provided a full, updated, affidavit.

Even if he had provided a full affidavit last fall, a new one would be required now, as the Court is unlikely to rely on a 9-month old affidavit.

Jeff

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**From:** Lynette Dearborn [<mailto:lynette@millerlawnh.com>]  
**Sent:** Monday, June 8, 2015 2:43 PM  
**To:** Spear, Jeffrey C.  
**Cc:** Robert Waters; Jeremey Miller  
**Subject:** Miller and J. Miller & Associates, PLLC

Attorney Spear,

Per your recent request, attached please find:

1. Properly scanned checks for Kandice Miller
2. Amended Personal Debt Spreadsheet for Jeremey Miller
3. Release to QuickBooks for ledger sheets

I believe that the only information you are now lacking is a NH Court Financial Affidavit for Attorney Miller. I thought that a Financial Statement, which would be equal or superior to the Financial Affidavit, had been previously provided with the discovery. However, if that is not the case or if that was insufficient, I will send a completed Financial Affidavit to you shortly.

Lynette

*Lynette K. Dearborn*

Litigation Paralegal

J. Miller & Associates, PLLC

210 N. State Street, Suite 2B

Concord, NH 03301

(603) 223-6613 Phone

(603) 386-6570 Fax

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Robert M. Waters, Esq.  
Waters & Associates, PLLC

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT



Merrimack Superior Court  
163 North Main St./PO Box 2880  
Concord NH 03302-2880

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

NOTICE OF DECISION

JEFFREY C. SPEAR, ESQ  
ORR & RENO PA  
ONE EAGLE SQUARE  
PO BOX 3550  
CONCORD NH 03302-3550

Case Name: David Johnston Development, LLC, et al v Lakes Region Gaming, LLC, et al  
Case Number: 217-2006-EQ-00112

Please be advised that on August 27, 2015 Judge Smukler made the following order relative to:

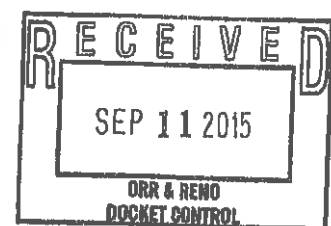
Motion for Contempt Against Jeremy Miller "No objection. Motion granted".

September 09, 2015

Tracy A. Uhrin  
Clerk of Court

(484)

C: Robert M. Waters, Jr., ESQ



New Hampshire Supreme Court  
**Professional Conduct Committee**  
*a committee of the attorney discipline system*

David M. Rothstein, Chair  
Benette Pizzimenti, Vice Chair  
Elaine Holden,\* Vice Chair  
Peter G. Beeson  
Susan R. Chollet\*  
Alan J. Cronheim  
Richard H. Darling\*

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

Heather B. Kranis  
Georges Roy\*  
Richard D. Sager  
Martha Van Oot  
Mary Elizabeth Tenn  
\* non attorney member  
Holly B. Fazzino, Administrator

LD-2014-0001, In the Matter of Jeremy A. Miller

**REISSUED PUBLIC CENSURE**

In accordance with Supreme Court Rule 37(12), on March 11, 2014, the New Hampshire Supreme Court ruled that the above captioned reciprocal discipline matter from the Grievance Commission of the Maine Board of Overseers of the Bar warrants the issuance of a public censure. The Court remanded the matter to the Professional Conduct Committee for the issuance of a public censure.

**I. FACTS**

Jeremy A. Miller has been at all times relevant hereto an attorney duly admitted to and engaging in the practice of law in the State of Maine and subject to the Maine Bar Rules and the Maine Rules of Professional Conduct. Mr. Miller was admitted to the Maine Bar in November of 2008 and primarily practices law in New Hampshire. Mr. Miller has his own law firm, J. Miller & Associates, PLLC located in Concord, New Hampshire.

On April 14, 2011, Attorney Stev Parker filed a grievance complaint against Mr. Miller. At the time of the filing, Mr. Miller was also a partner in Legal Helpers Debt Resolution (LHDR), a national debt resolution law firm. During the time period in question, Mr. Miller was the only Maine lawyer affiliated with LHDR. Among other things, Mr. Parker's complaint alleged that he had experienced difficulty determining the extent of LHDR/Mr. Miller's representation in various Maine collection matters.

In that regard, Mr. Parker identified five cases he had been handling in which Mr.

Miller/LHDR represented the opposing parties. Mr. Parker reported that he was unable to engage in any discourse with Mr. Miller concerning settlement offers, proposed motions, court scheduling orders or responses to discovery. Mr. Parker explained that he repeatedly tried to contact Mr. Miller after Mr. Miller filed answers in some litigation matters, but that Mr. Miller did not respond to Mr. Parker's communications.

Mr. Parker also referenced that in certain cases in which Mr. Miller either did not appear at scheduled hearings and/or failed to respond to discovery, orders unfavorable to Mr. Miller's clients were issued by the respective courts.

Mr. Miller filed a response to the grievance complaint. In that response, Mr. Miller acknowledged the complex issues presented by his partnership in LHDR and the resultant problems it caused. While Mr. Miller largely denied any professional misconduct he did explain how his work with LHDR evolved and acknowledged some of the resultant lapses in client representation.

In 2009, Mr. Miller entered into a partnership with LHDR that was separate from Mr. Miller's own law firm. Mr. Miller had no management role in the LHDR partnership, but he now agrees that his participation as a partner contributed to a systematic and continuous presence of LHDR in Maine through advertising that raised concerns under M. R. Prof. Conduct 5.5(b)(1). Mr. Miller also recognized that he had neglected some litigation cases, including the "Parker" cases as referenced above. Mr. Miller had assigned those cases to an associate attorney, but failed to adequately supervise the associate in violation of M. R. Prof. Conduct 5.1(b). While prospective clients did not physically meet with any LHDR employees, in October of 2010, Mr. Miller began making himself personally available to clients who requested him to do so.

As a result of the events contributed to by his inadequate supervision of associates, Mr. Miller instituted new office policies and procedures to ensure that all clients would be competently represented. Mr. Miller has acknowledged that his lack of direct involvement with clients and his admitted neglect and failure to supervise an associate attorney resulted in violations of the Maine Rules of Professional Conduct.

Panel D of the Grievance Commission ("The Panel") noted that much of the misconduct occurred in this grievance matter was the result of the case management practices adopted by the managing attorneys of LHDR. Furthermore, it appears that LHDR did not generally inform Mr.

Miller of important events occurring in Maine concerning LHDR clients. Mr. Miller did receive a related "warning" letter from the Maine Bureau of Consumer Credit Protection, but he failed to appreciate the import of that letter as it regarded the consumers assigned to his caseload.

Additionally, Mr. Miller was unaware and LHDR did not inform him that the State of Illinois had issued a Cease and Desist Order against LHDR in Illinois. Subsequently, a June 2011 Cease and Desist Order was issued in Maine, and upon being advised of it, Mr. Miller declined to represent any *new* clients of LHDR. Mr. Miller has continued to represent or has completed his representation of existing clients from the LHDR partnership, but he has not accepted any new cases. Mr. Miller also declined to participate in *new* cases involving any other debt management law firm. While not accepting new cases from such firms, Mr. Miller continues to fulfill obligations to those individuals with whom he already has an attorney-client relationship.

The Panel found that Mr. Miller's detachment from clients was a direct result of LHDR's practice model, but that his conduct violated M. R. Prof. Conduct 1.3 (diligence) and 1.4 (communication). In his capacity as a partner of LHDR, Mr. Miller had an additional duty under M. R. Prof. Conduct 5.1 and 5.3 to ensure that subordinate lawyers and the non-lawyer assistants associated with LHDR as subcontractors were adequately supervised so that their conduct did not violate any provisions of the Maine Rules of Professional Conduct.

Since then, LHDR has voluntarily settled the issues raised by the State of Maine concerning LHDR's representation of Maine residents. That agreement, the "Assurance of Discontinuance," was executed on December 6, 2012. The Panel received a copy of that agreement into evidence at the stipulated hearing.

The Panel noted that no bar grievance complaint against Mr. Miller has been filed by any clients of Mr. Miller or LHDR. Further, Mr. Miller understands that LHDR has paid some restitution to some aggrieved clients as a result of the advocacy of the Maine Bureau of Consumer Credit Protection.

Mr. Miller had no involvement in the design of LHDR's business model or LHDR's practices and procedures. However, he was a partner in the LHDR firm and was responsible for taking reasonable steps to ensure that the firm had in place measures giving reasonable assurance that, with respect to Maine clients, the conduct of firm lawyers, staff and independent contractors

conformed to the Maine Rules of Professional Conduct. Mr. Miller had the same obligations with respect to the lawyers and staff of his own law firm. Mr. Miller failed to fulfill those obligations and, accordingly, some clients were harmed. As a result, the Panel issued a reprimand to Mr. Miller and cautioned him to carefully assess potential associations with other law firms, particularly so with regard to the use of non-lawyer assistants and subcontractors. Mr. Miller is also reprimanded for his failure to engage in appropriate supervision of client matters. He is directed to do so in the future.

## II. RULINGS OF LAW

The Maine Rules of Professional Conduct specifically require attorneys to uphold their responsibilities to clients and the courts. Due to Mr. Miller's above-outlined failures, some of his clients were not properly served by the representation. The Panel noted that Mr. Miller has taken responsibility for his transgressions. At the disciplinary hearing, Mr. Miller expressed his remorse for his violations of the Maine Rules of Professional Conduct.

The purpose of bar disciplinary proceedings is not punishment, but rather the protection of the public from attorneys who, by their conduct, have demonstrated that they are unable to properly discharge their professional duties. *See* M. Bar R. 2(a). Since the evidence supports a finding and Mr. Miller agreed that he did in fact violate the Maine Rules of Professional Conduct, the Panel found that a Reprimand in GCF No. 11-130 serves those purposes.

The Panel accepted the agreement of the parties, including Mr. Miller's separately executed waivers of any objection to this Report and waiver of appeals. The Panel concluded that the appropriate disposition of this case was a Public Reprimand to Jeremy A. Miller, Esq., which was issued and imposed upon him pursuant to M. Bar R. 7.1(e)(3)(C), (4).

Mr. Miller's failures violated Maine Bar Rule 1.3, 1.4, 5.1 and 5.3.

## III. ANALYSIS

The panel found that a Public Reprimand is the appropriate sanction, which was issued on June 14, 2013.

#### IV. SANCTION

The Professional Conduct Committee deliberated the matter on February 18, 2014, and recommended to the Court that for purposes of reciprocal discipline, a sanction of public censure is the equivalent to a public reprimand imposed by the State of Maine Grievance Commission, Board of Overseers. The Court concluded that a public censure is warranted, and the Committee hereby issues a Public Censure.

#### V. COSTS

Mr. Miller 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. The assessment of costs shall become final unless Mr. Miller 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. Miller shall be responsible for any costs incurred as a result of the Attorney Discipline Office's collection efforts.

March 25, 2014

  
\_\_\_\_\_  
David M. Rothstein, Chair

Distribution:

Jeremey A. Miller, Esquire  
Janet F. DeVito, General Counsel  
File

**THE STATE OF NEW HAMPSHIRE****SUPREME COURT****ORDER****LD-2014-0009, In the Matter of Jeremy A. Miller, Esquire**

On October 1, 2014, the Attorney Discipline Office (ADO) filed a certified copy of an order of the Maine Supreme Judicial Court, in which the court determined that Attorney Jeremy A. Miller violated the Maine Rules of Professional Conduct and ordered that he be suspended from the practice of law in Maine for a period of three months, with the entire suspension period conditionally suspended from implementation.

The Maine Supreme Judicial Court found that Attorney Miller violated the rules of the United States Bankruptcy Court for the District of Maine when he filed a bankruptcy petition and supporting documents using the court's electronic case filing system despite the fact that the supporting documents did not contain an original signature of the client, as required. The court found that Attorney Miller's conduct, though unintentional, violated Maine Rules of Professional Conduct 1.3, 3.3(a), and 8.4(a) and (d). It ordered that Attorney Miller be suspended from the practice of law in Maine for three months, but that the suspension itself be suspended on the condition that Attorney Miller comply with certain conditions.

In accordance with Supreme Court Rule 37(12), which governs reciprocal discipline, the court issued an order requiring that a copy of the Maine Supreme Judicial Court's order be served on Attorney Miller. The court ordered Attorney Miller and the Professional Conduct Committee (PCC) to inform the court if either contended that the imposition of identical or substantially similar discipline would be unwarranted. The PCC notified the court that it believed that a three-month suspension, conditionally suspended, was warranted. Attorney Miller filed no response.

Rule 37(12)(d) provides for the imposition of the same or substantially similar discipline by the Supreme Court unless the respondent attorney or the PCC demonstrates, or the court finds, based on the face of the record from which the discipline is predicated, that:

- (1) The procedure [followed by the jurisdiction imposing discipline] was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) The imposition of the same or substantially similar discipline by the court would result in grave injustice; or

(3) The misconduct established warrants substantially different discipline in New Hampshire.

Having reviewed the order of the Maine Supreme Judicial Court, the court is unable to find on the face of the record any basis for imposing substantially different discipline. See Rule 37(12)(d). It is clear from the record that Attorney Miller had an opportunity to participate, and did participate, in the Maine disciplinary proceedings. The court does not find that the imposition of a three-month suspension, conditionally suspended, would result in grave injustice or that Attorney Miller's misconduct would warrant substantially different discipline in New Hampshire. Accordingly, the court concludes that the imposition of the same discipline is warranted. It orders that Attorney Jeremy A. Miller be suspended from the practice of law in New Hampshire for a period of three months, and that the implementation of the entire suspension period be suspended on the condition that Attorney Miller comply with all of the terms set forth in the order of the Maine Supreme Judicial Court.

If the ADO and/or the PCC determines at any time that Attorney Miller has not met the conditions set forth in the order of the Maine Supreme Judicial Court, the PCC shall hold further proceedings to determine what additional action should be taken, which may include the filing of a request with the court to impose the three-month suspension.

Dalianis, C.J., and Hicks, Conboy, and Lynn, JJ., concurred.

DATE: November 21, 2014

ATTEST:

  
Eileen Fox, Clerk

Distribution:  
Professional Conduct Committee  
Janet F. DeVito, Esquire  
Sara S. Greene, Esquire  
Jeremy A. Miller, Esquire  
File