

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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REPRIMAND AND ORDER ON COSTS

On September 20, 2016, the Professional Conduct Committee (the “Committee”) deliberated the Stipulation as to Facts and Rule Violation (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; Peter G. Beeson, Richard H. Darling, David W. McGrath, Mona T. Movafaghi, Georges J. Roy, Richard D. Sager and Martha Van Oot. Elaine Holden, Margaret R. Kerouac, and Susan R. Chollet were absent.

Having reviewed the Record, the Committee approved the facts as stipulated, by clear and convincing evidence. The Committee then approved the findings of violations of the New Hampshire Rules of Professional Conduct (the “Rules”) as stipulated, and voted to approve the agreement to reimburse the Committee for all costs of investigation and prosecution of this matter. Finally, the Committee agreed that the Stipulation’s recommendation of a reprimand was an appropriate sanction.

I. FINDINGS OF FACT

The Committee determined that the Record supports the following factual findings by clear and convincing evidence:

Facts

Background Facts

1. Brian D. Kenyon (“Mr. Kenyon”) is an attorney licensed to practice law in New Hampshire. Mr. Kenyon was admitted to the New Hampshire Bar in 1978. He has not been admitted to practice law in any other jurisdiction.
2. At all times material to this proceeding, Mr. Kenyon worked at the Marshall Law Office located at 47 Depot Road, East Kingston, New Hampshire.
3. Mr. Kenyon has no disciplinary history.
4. This matter arises from a referral from Raymond W. Taylor, Clerk of Rockingham County Superior Court, submitted in accordance with Supreme Court Administrative Order 2010-06, which requires that civil complaints alleging malpractice be forwarded to the Attorney Discipline Office (“ADO”). Enclosed was a copy of the complaint from a matter captioned *Ed’s Carpet Tile and Hardwood, Inc. v. Brian D. Kenyon, Esq.*, Docket No. 218-2013-cv-1058, Rockingham Superior Court (“the malpractice action”).

The Underlying Litigation

5. Ed’s Carpet is a flooring company that installs carpet and other flooring. Construction Services of New Hampshire, LLC (“CSNH”) is a general contractor that hires sub-contractors such as Ed’s Carpet for various projects. In March 2010, the principal of Ed’s Carpet, Mr. Edward Cross (“Mr. Cross”), retained the Marshall Law Firm to bring a breach of contract matter against CSNH for its failure to pay \$5,166.98 for a job that Ed’s Carpet had performed. The matter was assigned to Mr. Kenyon, who filed the writ on March 29, 2010.
6. CSNH filed counterclaims against Ed’s Carpet alleging breach of contract and negligent performance of work. CSNH initially submitted a counterclaim regarding work done by Ed’s Carpet at Mont Vernon Elementary School, but subsequently filed an amended counterclaim to include two additional projects that Ed’s Carpet worked on as a subcontractor.
7. Among CSNH’s allegations were that Ed’s Carpet:
 - a) failed to properly acclimate material at a jobsite before installation, thereby breaching a duty owed to CSNH;

- b) refused to replace or pay for carpeting that experienced unusual wear, which the manufacturer denied was covered under warranty; and
- c) advised that defects in flooring it installed resulted from moisture in the underlying concrete slab, when the reason for the defects was that the floor had not been prepared properly before the leveler was installed by Ed's Carpet.

8. The trial court set deadlines for Ed's Carpet's expert witness disclosures for January 11, 2011 for its claims as a plaintiff, and February 11, 2011 to defend against the counterclaims. Mr. Kenyon did not disclose an expert witness prior to either deadline. CSNH disclosed two experts: 1) its owner, Dennis Cloutier, as an expert on construction repair estimates, and 2) a causation expert.

9. On or about May 11, 2011, Mr. Kenyon disclosed a witness list that included Mr. Cross. Mr. Kenyon failed to provide notice that Mr. Cross might serve as an expert witness in a manner which complied with Superior Court Rule 35.

10. On about June 14, 2014, Mr. Cross's deposition was taken by counsel for CSNH. During the deposition, counsel for CSNH posed questions with respect to opinion testimony Mr. Cross might offer. Mr. Kenyon negligently made the assumption that Mr. Cross's opinion testimony would be allowed at trial to support the defenses to the counterclaims, without making further disclosures. Mr. Kenyon also failed to confirm his expectation with opposing counsel.

11. Mr. Kenyon would testify that he and Mr. Cross discussed the issue of hiring an independent expert to defend against the counterclaims. They chose not to do so because of cost concerns. Instead, they concluded Mr. Cross could offer all the necessary opinion testimony and he was expected to do so. Further, they believed that CSNH's counterclaims were a bluff, intended to intimidate Mr. Cross, its former subcontractor, into accepting a settlement offer. Finally, Mr. Kenyon believed the jury would find Mr. Cross far more credible than Mr. Cloutier. Mr. Kenyon did not document his file with respect to this decision.

12. On October 12, 2011, CSNH filed a motion in limine seeking to preclude Ed's Carpet from offering any expert opinion testimony relating to the cause or causes of the complained-of floor covering failures, because it had failed to disclose an expert witness. Mr. Kenyon filed an objection to the motion in limine on October 25, 2011 asserting, in relevant part, that "Plaintiff Ed Cross is a necessary witness herein and his deposition was taken by counsel for Defendant/Counter-Claimant on June 14, 2011" and

“Defendant/Counter-Claimant have been sufficiently apprised of Plaintiff’s opinions, the basis for said opinions and his qualifications to avoid any surprise at the time of trial.”

13. The case was tried before a jury between November 2, 2011 and November 4, 2011. The court (Delker, J.) did not rule on the motion in limine before trial, but it prohibited Mr. Cross from testifying as an expert during the trial. Mr. Cross testified as a fact witness only.

14. There is a reasonable possibility that a different trial judge would have ruled differently, and would have allowed the expert testimony under these circumstances.

15. During the trial, CSNH’s expert on construction repair estimates, Dennis Cloutier, testified. Further, CSNH had a second expert testify on causation relating to the counterclaims.

16. Ed’s Carpet prevailed on its breach of contract claim and the jury awarded \$5,166.98 in damages. CSNH prevailed on its counterclaims and the jury awarded \$25,404.01 in damages.

17. Following the verdict, Mr. Kenyon filed both a Motion to Set Aside Verdict and a Motion for New Trial. The court denied both motions.

18. Mr. Kenyon explained the appeal process to Mr. Cross and told him the office had a policy not to charge for the work on an appeal. Mr. Cross nevertheless chose not to pursue an appeal to the Supreme Court.

The Malpractice Action

19. Ed’s Carpet filed the malpractice action against Mr. Kenyon with the Rockingham County Superior Court on September 20, 2013. Among other allegations, counsel for Ed’s Carpet alleged in relevant part that Mr. Kenyon had failed to notice Mr. Cross as an expert witness.

20. The trial court dismissed the malpractice action against Mr. Kenyon, with prejudice. Ironically, the dismissal resulted from the defense’s motion in limine to preclude the plaintiff from offering expert testimony regarding the standard of care applicable to an attorney, since the plaintiff failed to disclose an expert witness in compliance with the Rules and court orders.

21. The dismissal was upheld by the Supreme Court.

II. RULINGS OF LAW

The parties stipulated that Mr. Kenyon violated New Hampshire Rules of Professional Conduct 1.1 and 1.3; and 8.4(a).

Rule 1.1: Competence

Mr. Kenyon owed a duty to his client, Ed's Carpet, to provide competent representation.

Mr. Kenyon failed to attend to details and schedules sufficiently to assure that his client's matter was undertaken with no avoidable harm to its interests. Mr. Kenyon failed to timely and formally disclose Mr. Cross as an expert witness.

Mr. Kenyon's failure resulted in the exclusion of Mr. Cross's opinion testimony and likely contributed to the jury's decision to award the full amount of the requested counterclaims to CSNH, resulting in harm to Mr. Kenyon's client.

Rule 1.3: Diligence

Mr. Kenyon had a duty to act with reasonable diligence on behalf of his client.

Mr. Kenyon breached this duty by failing to disclose Mr. Cross as an expert witness before the established expert witness disclosure deadline of February 11, 2011. The failure to meet the disclosure deadline allowed the opposing party to successfully bring a motion in limine to exclude Mr. Cross's opinion testimony, thereby limiting Mr. Kenyon's client's defense with respect to the counterclaims.

Rule 8.4(a): General Rule

Rule 8.4(a) provides that it is professional misconduct for a lawyer to violate the Rules of Professional Conduct and, in this case, is derivative of Respondent's Rule 1.1 and 1.3 violations.

The Committee concludes that there is clear and convincing evidence that Mr. Kenyon violated Rules of Professional Conduct 1.1, 1.3, and 8.4(a).

III. ANALYSIS

Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support the sanction of a six-month suspension.

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).

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.

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. 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.*

Prong I: Duty Violated

Under the first prong of the analysis, Mr. Kenyon violated duties owed to his client.

Prong II: Mental State: Intent/ Knowing or Negligent

The parties agree that Mr. Kenyon's mental state was negligent with respect to the rule violations.

Prong III: Injury or Potential Injury

The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Kenyon's misconduct. Mr. Kenyon's conduct potentially contributed to his client's injury in the underlying litigation because CSNH prevailed on its counterclaims and

the jury awarded \$25,404.01 to CSNH. Given that the matter was tried before a jury, the degree to which the exclusion of Mr. Cross's opinion testimony and/or other factors affected the jury's decision cannot be readily determined.

IV. SANCTION

In determining a baseline sanction, *Standards* § 6.2 addresses the failure to obey any obligation under the rules of a tribunal except for an open refusal based on the assertion that no valid obligation exists. *Standards* § 6.22 states that “[s]uspension 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 party. . . .” The Committee finds that the baseline sanction in this case is a public censure.

Having determined the baseline sanction, the Committee must consider aggravating and mitigating factors. In this case, one aggravating factor is present: Mr. Kenyon's substantial experience in the practice of law. See *Standards* § 9.22.

However, several mitigating factors are also present, including: absence of a prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to the ADO; and a cooperative attitude toward proceedings. The mitigating factors outweigh the aggravating factors in this matter, and the parties agree to a reprimand. The Committee approves this agreement.

This sanction is in accord with the purposes of attorney discipline. See e.g., *Conner's Case* 158 N.H. at 303; *Richmond's Case*, 152 N.H. 155, 159-60 (2005). The purpose of the Court's disciplinary power “is not to inflict punishment but rather to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.” *Grew's Case*, 156 N.H. 361, 365 (2007) (quotation and citation omitted). The sanction is also in accord with the *Standards*.


V. COSTS

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

VI. CONCLUSION

For all of the above reasons, the Professional Conduct Committee issues this Reprimand for violating N.H. Rules of Professional Conduct 1.1, 1.3, and 8.4(a).

October 7, 2016



David M. Rothstein
Chair

cc: Elizabeth M. Murphy, Assistant Disciplinary Counsel
William C. Saturley, Esquire
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