

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 Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Peter G. Beeson, Susan R. Chollet, Richard H. Darling, Margaret R. Kerouac, David W. McGrath, Mona T. Movafaghi, Georges J. Roy, Richard D. Sager and Martha Van Oot. David M. Rothstein, Chair was recused.

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 public censure was an appropriate sanction.

I. FINDINGS OF FACT

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

A. Facts

1. Mr. O'Leary is an attorney licensed to practice law in New Hampshire. He was admitted to practice in 1986.
2. Mr. O'Leary was admitted to practice in Maine in 1987. His status there is "registration suspension" (equivalent of administration suspension).
3. Mr. O'Leary has no disciplinary history.
4. By letter dated June 25, 2015, Stephanie Hausman filed a grievance with the ADO based on Mr. O'Leary's failure to file a notice of appeal after handling an ineffective assistance of counsel case as further set forth below. The case was referred to Disciplinary Counsel on April 13, 2016.
5. On September 16, 2013, following a jury trial, Oscar Grande was found guilty of armed robbery. Mr. Grande was later sentenced to serve 7 ½ to 15 years in prison.
6. On November 14, 2013, Mr. Grande, through then-defense counsel, Donald C. Topham, filed a Notice of Appeal with the New Hampshire Supreme Court (the "Court"), which the Court accepted (the "Direct Appeal"). Stephanie Hausman of the New Hampshire Appellate Defender's Office was appointed to represent Mr. Grande on the Direct Appeal.
7. In correspondence dated April 7, 2014, Ms. Hausman explained to Mr. Grande why she believed that it was preferable that he raise the issue of ineffective assistance of counsel with the Superior Court, instead of on Direct Appeal. On April 22, 2014, the Direct Appeal was stayed to enable Mr. Grande to pursue a Motion for New Trial based solely on his ineffective assistance of trial counsel claim (the "IAC claim").
8. In an order dated June 19, 2014, the Superior Court appointed Mr. O'Leary to represent Mr. Grande on the IAC claim.
9. Ms. Hausman and Mr. O'Leary spoke by phone at least twice about Ms. Hausman's handling of the Direct Appeal. They also discussed strategy on the IAC claim.
10. On October 16, 2014, the Superior Court held a hearing on the IAC claim. In an order dated November 3, 2014, the Superior Court denied the IAC claim.

11. On November 12, 2014, Mr. O'Leary filed a motion to reconsider the Superior Court's decision, which was denied on November 25, 2014.
12. On December 18, 2014, Ms. Hausman emailed Mr. O'Leary asking "whether you have filed a discretionary [Notice of Appeal (the "NOA")] on the post-trial issues and, if not, whether you intend to do so?" However, Mr. O'Leary failed to respond to that email.
13. On December 22, 2014, Ms. Hausman, once again, emailed Mr. O'Leary, stating: "Just checking in on this case again. I will be out for the next 2 weeks and I just wanted to make sure that you are on track for filing the discretionary NOA by Jan. 2."
14. Mr. O'Leary did not respond to Ms. Hausman's email. Mr. O'Leary stated that he did not see either of Ms. Hausman's emails at the time she sent them. He was out of town from December 18, 2014 through December 22, 2014, and then the holidays ensued and he did not review the emails at that time. When he returned to the office after the holidays, he received and opened all of his newer emails, but not the oldest unopened emails (which included Ms. Hausman's email regarding the NOA). He believes he simply did not "scroll down" far enough to get to the oldest emails, an oversight that occurred in the rush of reviewing emails after a few weeks largely out of the office, and one which he deeply regrets.
15. Mr. O'Leary states that he has since improved his practice to ensure that such a mistake will not occur again. For example, he now has a smartphone (which he did not have in 2014) which is synched to his office email.
16. Attorney O'Leary did not file a Notice of Appeal in the Supreme Court on the issue upon which he was appointed.
17. On February 6, 2015 (more than a month after the deadline to file the NOA passed), Mr. Grande filed a *pro se* motion to allow the late filing of the NOA. In an order dated March 2, 2015, the Supreme Court clerk directed Mr. Grande "to file a notice of discretionary appeal in compliance with Rule 7 on or before March 23, 2015, after which the court would rule on his motion to allow late filing of a notice of appeal."
18. However, Mr. Grande failed to file the NOA on or before March 23, 2015, resulting in the Court's denial of his motion to allow the late filing of the NOA.
19. Neither Mr. Grande nor Ms. Hausman (who was copied on the Court's orders) contacted Mr. O'Leary to inform him that Mr. Grande filed the

motion, that the Court directed Mr. Grande to file the NOA on or before March 23, 2015, or that the deadline passed without Mr. Grande's filing the NOA. Mr. O'Leary states that had he known this, he would have promptly rectified the situation.

20. Because Mr. Grande failed to appeal the Court's denial of Mr. Grande's motion for new trial, the Supreme Court refused to consider the IAC claim in the Direct Appeal.
21. Mr. O'Leary acknowledges that his failure to file the NOA was a mistake on his part. He did not realize that "the issues raised, litigated, and decided in the collateral IAC case would need to be the basis of a separate discretionary NOA filed on Mr. Grande's behalf." Specifically, Mr. O'Leary believed that the appeal of the IAC claim would be taken up by Ms. Hausman in the Direct Appeal.
22. This misapprehension is why Mr. O'Leary, even in the absence of any reminders from Ms. Hausman, did not docket any deadlines upon the denial of his motion to reconsider. He negligently believed that the IAC claim could be "swept up" with the Direct Appeal, which he knew Ms. Hausman to be handling.
23. Mr. O'Leary admits that he did not review Supreme Court Rule 3 (definitions section), which defines "mandatory appeal," and specifically excludes certain categories from that definition, including post-conviction review proceedings (such as motions for a new trial) and collateral challenges to a conviction or sentence.

II. RULINGS OF LAW

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

Rule 1.1 (Competence) and Rule 1.3 (Diligence)

Mr. O'Leary violated Rules 1.1 and 1.3 when he failed to sufficiently inform himself regarding mandatory appeals and whether he was responsible for filing a discretionary NOA on behalf of Mr. Grande for the IAC claim.

Mr. O'Leary violated Rules 1.1 and 1.3 when he failed to diligently review his email upon return from time away from his office, resulting in his missing two emails from Ms. Hausman asking whether he intended to file the NOA for

the IAC claim.

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. O'Leary 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. O'Leary violated duties owed to his client, Mr. Grande.

Prong II: Mental State: Intent/ Knowing or Negligent

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

Prong III: Injury or Potential Injury

The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. O'Leary's misconduct. Mr. O'Leary's conduct caused injury to Mr. Grande, who lost this ability to appeal his IAC claim.

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, there are no aggravating factors present. *See Standards* § 9.22.

In this case, the only aggravating factor is Mr. O'Leary's substantial experience in the practice of law. *See Standards* § 9.22. Mitigating factors include absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to the ADO, and remorse. *See Standards* § 9.32.

The parties agree that the mitigating factors evident in this case outweigh the aggravating factors and warrant a downward departure to a reprimand as the appropriate sanction.

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. O’Leary has signed an agreement to pay costs of the investigation and prosecution of this disciplinary matter. The Committee approves this agreement. Mr. O’Leary 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 and 8.4(a).

January 18, 2017



Heather E. Krams
Vice Chair

cc: Sara S. Greene, Disciplinary Counsel
Charles F. O’Leary, Esquire
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