

New Hampshire Supreme Court  
**Professional Conduct Committee**

*a committee of the attorney discipline system*

David M. Rothstein, Chair  
Heather E. Krans, Vice Chair  
Elaine Holden,\* Vice Chair  
Peter G. Beeson  
Susan R. Chollet\*  
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Martha Van Oot  
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Barbara J. Guay, Legal Assistant

*Chisholm, Kevin P. advs. Attorney Discipline Office - #14-038*

**PUBLIC CENSURE AND ORDER ON COSTS**

On January 17, 2017, the Professional Conduct Committee (“the Committee”) deliberated the Stipulation as to Facts, Violations and Sanction (“the Stipulation,” attached as **Exhibit A**), and the Agreement to Pay Costs of Disciplinary Matter (attached as **Exhibit B**). Members present included David M. Rothstein, Chair; Heather E. Krans, Vice Chair; Elaine Holden, Vice Chair; Peter G. Beeson; Susan R. Chollet; Caroline K. Leonard; David W. McGrath; Mona T. Movafaghi; Georges J. Roy; and Martha Van Oot. Richard H. Darling and Margaret R. Kerouac were absent.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that Mr. Chisholm’s conduct violated Rules of Professional Conduct 1.1, 1.3, 1.4, and 8.4(a), as stipulated.

The Committee also concluded that a public censure is appropriate. Its sanction is in accord with the purposes of attorney discipline. *See e.g., Conner’s Case* 158 N.H. 299, 303 (2009); *Richmond’s Case*, 152 N.H. 155, 159-60 (2005). The sanction is also in accord with the *ABA Standards for Imposing Lawyer Sanctions* (2005) (“Standards”).

Having approved the stipulated sanction, the Committee approved the agreement that Mr. Chisholm shall reimburse the Committee for all costs of investigation and prosecution of this matter.

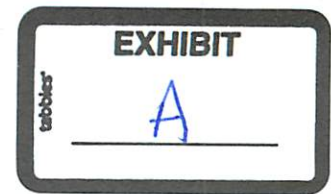
January 26, 2017



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David M. Rothstein  
Chair

cc: Brian R. Moushegian, Deputy General Counsel  
Kevin P. Chisholm, Esquire  
File



**NEW HAMPSHIRE SUPREME COURT  
PROFESSIONAL CONDUCT COMMITTEE**

Chisholm, Kevin P.

advs.

Attorney Discipline Office

#14-038

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

Respondent Kevin P. Chisholm, Esq., and the Attorney Discipline Office (ADO) stipulate as follows:

**I. Facts**

1. Kevin A. Chisholm ("Mr. Chisholm") is an attorney licensed to practice law in New Hampshire. He was admitted to practice on October 30, 1995.
2. Mr. Chisholm has not been admitted to practice in any other jurisdiction.
3. Mr. Chisholm has a disciplinary history. In 2008, Mr. Chisholm received a public censure based on his violations of the Rules of Professional Conduct (the "Rules"), including Rule 1.3 (Diligence) and Rule 1.4 (Client Communications). *See Chisholm, Kevin P. advs. Lori Thibault*, Docket # 07-032.
4. For a majority of the time relevant to this proceeding, Mr. Chisholm was an Associate at the law firm of J. Miller & Associates, PLLC, located at

210 North Main Street, Suite 2B, Concord, New Hampshire (the “Miller Firm”).

5. Mr. Chisholm currently practices law at Chisholm Law Office, 195 Elm Street, Manchester, New Hampshire 03101.
6. By letter dated August 12, 2014, Mr. Wayne Munroe (“Mr. Munroe”) filed a grievance with the ADO based on Mr. Chisholm’s failure to file a brief on Mr. Munroe’s behalf with the New Hampshire Supreme Court (the “Court”). He alleged that, as a result of that failure, the Court dismissed Mr. Munroe’s appeal of his Driving While Intoxicated-First Offense (“DWI-First Offense”) conviction.
7. Pursuant to a written agreement dated June 10, 2013, Mr. Munroe retained Mr. Chisholm to represent him following his arrest for DWI-First Offense.
8. On July 15, 2013, following a trial at which Mr. Chisholm represented Mr. Munroe, Mr. Munroe was convicted of DWI-First Offense.
9. Pursuant to a separate written agreement dated July 30, 2013, Mr. Munroe retained Mr. Chisholm to appeal Mr. Munroe’s DWI-First Offense conviction. Under the terms of the agreement, Mr. Munroe provided the Miller Firm with a retainer in the amount of \$1,500.00.
10. On August 12, 2013, Mr. Chisholm filed a Rule 7 Notice of Mandatory Appeal (the “Notice of Appeal”) of Mr. Munroe’s conviction with the Court.
11. On August 22, 2013, the Court confirmed its receipt of the Notice of Appeal, which was docketed as *State of New Hampshire v. Wayne R.*

*Munroe*, Docket No. 2013-0526 (the “Appeal”), noting that “[a] court order will be issued regarding further proceedings.”

12. In an email dated August 26, 2013, Mr. Chisholm informed Mr. Munroe that he had filed the Notice of Appeal and that Mr. Chisholm would be required to “write a brief on why...the [trial] court was wrong and then the state has a chance to respond.” Mr. Chisholm further explained to Mr. Munroe that after the briefs are filed “the court usually sets the case up for oral argument.”
13. On September 4, 2013, the Court notified the parties that the Appeal was accepted and that Mr. Munroe must provide the Court with a transcript of the trial. Mr. Chisholm received the notice and caused the transcript to be provided to the Court.
14. In an order dated November 7, 2013 (the “11/7/13 Order”), the Court confirmed that it had received the trial transcript. In addition, the Court ordered that “an original and eight copies of [Mr. Munroe’s] brief must be filed on or before December 23, 2013,” and that “[a]n original and eight copies of the State’s brief or memorandum of law...be filed on or before February 6, 2014.” Although the Court mailed a copy of the 11/7/13 Order to the Miller Firm’s correct address, Mr. Chisholm did not, at that time, see the 11/7/13 Order.
15. In an order dated January 8, 2014 (the “1/8/14 Order”), the Court dismissed the Appeal based on Mr. Munroe’s failure to file a brief on or before December 23, 2013. Although the 1/8/14 Order was mailed to

the Miller Firm's correct address, Mr. Chisholm, again, did not see the 1/8/14 Order.

16. On January 24, 2014, the Court issued a Mandate Under Sup. Ct. R. 24 (the "Mandate") closing the matter. The Court forwarded the Mandate to the Miller Firm's correct address. However, Mr. Chisholm did not, at that time, see the Mandate.
17. In an email dated April 7, 2014, Mr. Munroe requested an update on the Appeal.
18. On April 8, 2014, after contacting the Court, Mr. Chisholm informed Mr. Munroe that the Appeal was dismissed based on his failure to file a brief by the deadline. Mr. Chisholm represented to Mr. Munroe via email that "I never received any docs regarding deadlines and the court told me I can file a motion to try and reopen the case." Mr. Chisholm also informed Mr. Munroe that "I have asked my staff and they insist that we have not received anything from the Court."
19. At all relevant times, the Miller Firm had significant office management and administrative issues that likely contributed to Mr. Chisholm's failure to receive the notices from the Court.
20. In an email dated April 21, 2014, Mr. Chisholm informed Mr. Munroe that he was "filing [a] motion to reopen case" in an effort to address the Appeal's dismissal.
21. In an email dated May 12, 2014, Mr. Munroe requested that Mr. Chisholm refund the \$1,500.00 retainer if he did not contact Mr. Munroe

about reopening the case before June 1, 2014. On May 12<sup>th</sup>, Mr.

Chisholm responded via email that he would see the matter through “to the end.” Mr. Munroe did not hear back from Mr. Chisholm regarding the Motion to Reopen Case.

22. On August 18, 2014, Mr. Chisholm filed the Motion to Reopen Case with the Court.

23. In an order dated September 25, 2014, the Court denied the Motion to Reopen Case based on the Court’s previous issuance of the Mandate.

The Court noted that, in order to reopen the case, Mr. Munroe could file a Rule 11 Petition for Original Jurisdiction (the “Petition”) and, if such a petition were filed, the Court would waive the applicable filing fee.

However, based on Mr. Munroe’s filing of the grievance with the ADO, Mr. Chisholm terminated his representation of Mr. Munroe, believing a conflict had developed, and refrained from preparing and/or filing the Petition.

24. Mr. Munroe’s retainer was in the Miller Firm’s possession and control.

At the time that the retainer was paid, Mr. Chisholm was an Associate of the Miller Firm. Pursuant to Mr. Munroe’s request, Mr. Chisholm advised the Miller Firm that it reimburse a portion of Mr. Munroe’s retainer. However, Mr. Chisholm was informed by an employee of the Miller Firm, Lynette Dearborn, that the retainer had already disbursed and that it was no longer available.

25. Although Mr. Chisholm did not see the Court's order setting forth his deadline to file the brief, Mr. Chisholm acknowledges that his failure to file the brief on or before the December 23, 2013 deadline was an error on his part.
26. Mr. Chisholm also acknowledges that, following the issuance of the Mandate, his filing of the Motion to Reopen Case was procedurally incorrect and that he should have instead filed a Rule 11 Petition for Original Jurisdiction.
27. Mr. Chisholm further admits that his failure to communicate with Mr. Munroe between May 12, 2014, and August 2014 was improper. Mr. Chisholm failed to communicate with Mr. Munroe because of his disappointment and embarrassment regarding the Appeal's dismissal and his hope that he could favorably resolve the matter. He was also dealing with significant personal and professional issues which interfered with his ability to practice law. Mr. Chisholm has since addressed the personal issue, which involved a marital issue that resulted in divorce. In addition, Mr. Chisholm addressed the professional issue by ending his professional relationship with the Miller Firm, a firm with a history of poor management and organization.

## **II. Disciplinary Rules Violated**

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

### **Rule 1.1: Competence**

29. The allegations set forth above are incorporated herein by reference.
30. Rule 1.1 states in pertinent part:
  - (a) A lawyer shall provide competent representation to a client.
  - (b) Legal competence requires at a minimum:
    - (1) specific knowledge about the fields of law in which the lawyer practices;
    - (2) performance of the techniques of practice with skill;
    - (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
    - (4) proper preparation; and
    - (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.
  - (c) In the performance of client service, a lawyer shall at a minimum:
    - (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.
31. Pursuant to Rule 1.1, Mr. Chisholm had a duty to act with reasonable competence in representing Mr. Munroe.
32. Mr. Chisholm violated Rule 1.1 by failing to file a brief in the Appeal on or before December 23, 2013, resulting in the Appeal's dismissal.
33. Mr. Chisholm also violated Rule 1.1 by failing to file a Motion to Reopen Case before the Court issued the Mandate on January 24, 2014, and, upon learning of the Mandate, by filing a Motion to Reopen Case instead of a Rule 11 Petition for Original Jurisdiction.

### **Rule 1.3: Diligence**

34. The allegations set forth above are incorporated herein by reference.

35. Rule 1.3 states as follows:

A lawyer shall act with reasonable diligence and promptness in representing a client.

36. Pursuant to Rule 1.3, Mr. Chisholm had a duty to act with reasonable diligence and promptness in representing Mr. Munroe.

37. Mr. Chisholm violated Rule 1.3 by failing to file a brief in the Appeal on or before December 23, 2013, resulting in the Appeal's dismissal.

38. Mr. Chisholm also violated Rule 1.3 by failing to file a Motion to Reopen Case before the Court issued the Mandate on January 24, 2014, and by not filing a Petition for Original Jurisdiction.

### **Rule 1.4: Communication**

39. The allegations set forth above are incorporated herein by reference.

40. Rule 1.4 states as follows:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter.
- (4) promptly comply with reasonable requests for information; and;
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

- (b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.
40. Mr. Chisholm had a duty to keep Mr. Munroe reasonably informed about the status of his matter and to promptly comply with reasonable requests for information.
41. Mr. Chisholm breached this duty by failing to communicate with Mr. Munroe between May 12, 2014 and August 2014 regarding the matter.
42. Mr. Chisholm's failure to communicate with Mr. Munroe during the foregoing time period constituted a violation of Rule 1.4.

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

43. Having agreed to the foregoing violations, there is clear and convincing evidence that Mr. Chisholm's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

**III. Recommended Sanction**

44. The Attorney Discipline Office and Mr. Chisholm jointly recommend a public censure as the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.
45. The American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") supports this sanction.
46. 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).

47. 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.
48. 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.*
49. Under the first prong of the analysis, Mr. Chisholm violated duties owed to his client, Mr. Munroe to provide competent and diligent representation and to reasonably communicate with his client. *See Standards* §§ 4.5 and 4.4.
50. With respect to Mr. Chisholm’s mental state under the second prong of the sanction analysis, the parties agree that Mr. Chisholm’s mental state was negligent. Specifically, prior to April 8, 2014, Mr. Chisholm was

unaware of the Court's orders on the parties' briefing schedule, dismissal of the matter, and the Mandate. Although the relevant orders were mailed to Mr. Chisholm at his correct address at the Miller Firm, Mr. Chisholm did not see the orders. In accepting Mr. Chisholm's representation, the ADO takes into consideration the Miller Firm's history of poor office management and administrative practices. In addition, Mr. Chisholm did not know that, following issuance of the Mandate, he was required, procedurally, to file a petition for original jurisdiction instead of the Motion to Reopen Case.

51. Mr. Chisholm's failure to communicate with Mr. Munroe can be attributed, in significant part, to his disappointment and embarrassment at the Appeal's dismissal, certain personal and professional issues that he experienced at the time, and his hope that he could ultimately resolve the matter.
52. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Chisholm's misconduct.
53. Mr. Chisholm's conduct caused injury to Mr. Munroe because his appeal of the DWI-First Offense conviction was dismissed.
54. The parties agree that any injuries that Mr. Munroe suffered related to the retainer are attributable to the Miller Firm. The retainer was in the possession and control of the Miller Firm. Mr. Chisholm requested that the Miller Firm return the unearned portion of the retainer to Mr. Munroe. However, Lynette Dearborn of the Miller Firm informed Mr.

Chisholm that the Miller Firm, which considered the payment to be a flat fee, had already disbursed and spent the retainer.

55. Mr. Chisholm's violation of Rule 1.1 implicates Section 4.5 of the *Standards*, which provides as follows:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

4.53 Reprimand<sup>1</sup> is generally appropriate when a lawyer:

- (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
- (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

56. Mr. Chisholm's violations of Rule 1.3 and Rule 1.4 implicate Section 4.4 of the *Standards*, which provides as follows:

4.41 Disbarment is generally appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

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

- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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

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

57. Under the foregoing circumstances, the parties agree that the baseline sanction for Mr. Chisholm's conduct is a public censure. *See Standards* §§ 4.43 and 4.53.

58. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.

59. In this case, the aggravating factors are Mr. Chisholm's substantial experience in the practice of law (admitted in 1995) and past disciplinary history (2008 public censure). *See Standards* § 9.22. Mitigating factors include the absence of a dishonest or selfish motive, full and free disclosure to the ADO, the remoteness of the prior offense, personal

problems at the time of the violation, and remorse. *See Standards* § 9.32.

60. The parties agree that, although the mitigating factors slightly outweigh the aggravating factors, a downward departure is not warranted in this case given the harm to Mr. Munroe, *i.e.*, the dismissal of his Appeal.

#### **IV. Costs**

61. Subject to the PCC's approval of Mr. Chisholm's Stipulation, Mr. Chisholm 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. Chisholm.


#### **V. Effect of Stipulation**

62. Mr. Chisholm understands that this Stipulation will be reviewed by the PCC pursuant to Sup. Ct. R. 37A(III)(aa).
63. Mr. Chisholm acknowledges that the admissions of misconduct and the proposed disposition contained in this Stipulation are freely, knowingly, and voluntarily submitted; that he could consult with an attorney regarding this Stipulation; 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; and that he is fully aware of the consequences of the Stipulation.

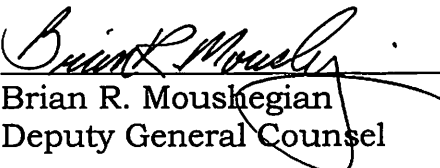
64. Mr. Chisholm knowingly and intelligently waives his right to a hearing.

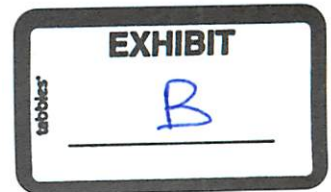
Respectfully submitted,

Dated: 12/12 2016

  
\_\_\_\_\_  
Kevin P. Chisholm, Esquire  
Respondent

Dated: December 12, 2016

  
\_\_\_\_\_  
Brian R. Moushegian  
Deputy General Counsel



**NEW HAMPSHIRE SUPREME COURT  
PROFESSIONAL CONDUCT COMMITTEE**

Chisholm, Kevin P.

advs.

Attorney Discipline Office

#14-038

**AGREEMENT TO PAY COSTS  
OF DISCIPLINARY MATTER**

1. Subject to the Professional Conduct Committee's (the "Committee") approval of the Stipulation as to Facts, Violations and Sanction in the above matter, I agree to pay 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: mileage, stenographers, transcripts, copying, inventory, audit expenses and publication.
2. As of December 12, 2016, I have been informed that the costs presently total approximately \$24.50. Should further costs accrue in the disposition of this matter, the Committee will bill me for those costs. I also agree to pay the increased costs, with notice to me from the Committee regarding those costs. If I dispute the bill, I shall notify the Committee of the specific nature of the dispute in writing within 30 days of my receipt of the bill. The Committee will consider the disputed item

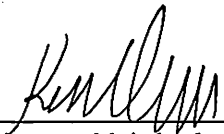
and issue a written decision. If I do not notify the Committee that I dispute a bill, payment will be due upon its receipt.

3. I understand the Committee will not issue an invoice until the final disposition of this matter.
4. I waive the provisions of Supreme Court Rule 37(19)(b) regarding any further detail of the nature and amount of each expense, and I also waive formal demand for payment.
5. I understand and agree that the assessment of costs is deemed final and shall have the full force and effect of a civil judgment. As a result, it may be enforced in any Superior Court in New Hampshire.
6. The Assessment shall become final unless I respond in writing, within thirty (30) days of receipt of the Committee's statement of expenses, listing each disputed expense and explaining my reasons for disagreement. Sup. Ct. R. 37(19)(b). The Committee may resolve the matter, or enforce the assessment by petition to the superior court in any county in the state. Sup. Ct. R. 37(19)(b).
7. The Committee may file a copy of the final assessment 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).

8. I also agree to be responsible for all costs incurred as a result of the Attorney Discipline Office's collection efforts.

Respectfully submitted,

Dated: 12/12 2016

  
\_\_\_\_\_  
Kevin P. Chisholm, Esquire  
Respondent