

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Nizetic, Gabriel advs. Attorney Discipline Office - #16-026

PUBLIC CENSURE AND ORDER ON COSTS

On March 21, 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 Heather E. Krans, Vice Chair; Elaine Holden, Vice Chair; Peter G. Beeson; Susan R. Chollet; Caroline K. Leonard; Mona T. Movafaghi; Georges J. Roy; and Martha Van Oot. Richard H. Darling; Margaret R. Kerouac; and David W. McGrath were absent. David M. Rothstein, Chair, was recused.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that Gabriel Nizetic’s conduct violated Rules of Professional Conduct 3.1 and 8.4(a), as stipulated.

The Committee also concluded that a public censure is appropriate. This 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. Nizetic shall reimburse the Committee for all costs of investigation and prosecution of this matter.

March 21, 2017



Heather E. Krans
Vice Chair

cc: Sara S. Greene, Disciplinary Counsel
Richard Y. Uchida, Esquire
File

**NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE**



Nizetic, Gabriel

advs.

Attorney Discipline Office

#16-026

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

Respondent Gabriel Nizetic, Esq., and the Attorney Discipline Office (ADO) stipulate as follows:

A. Facts

1. Gabriel Nizetic, Esq., is an attorney licensed to practice law in New Hampshire. Mr. Nizetic was admitted to practice in 1989.
2. Mr. Nizetic has also been admitted to practice law in Massachusetts. He was admitted in Massachusetts on June 15, 1988, and his current status there is "retired."
3. At all times material to this proceeding, Mr. Nizetic practiced law at Plymouth Law Center, 66 Highland St, Plymouth, New Hampshire.
4. Mr. Nizetic represented the State in a criminal case pending in the 2nd Circuit-District Division-Plymouth (the "Court"), *State vs. Daniel Tatro*, Docket #469-2014-cr-02081. Rebecca McKinnon, an attorney with the New Hampshire Public Defender's ("PD") office, represented the defendant, Mr. Tatro.

5. This disciplinary matter was initiated by referral from the presiding justice, the Honorable Thomas A. Rappa, Jr., on July 7, 2016. Mr. Nizetic's matter was referred to Disciplinary Counsel on October 24, 2016.
6. Mr. Nizetic has no disciplinary history.
7. The parties appeared for a trial management conference with the Court on January 14, 2016 (the "TMC"). At the TMC, counsel for the parties and the Court discussed the trial schedule in Mr. Tatro's matter (a willful concealment charge), as well as a hearing on a pending motion to impose a suspended sentence in a separate matter involving Mr. Tatro. At the time, the motion hearing was scheduled for February 10, 2016, and the willful concealment trial for March 25, 2016.
8. After briefly discussing Mr. Tatro's two matters with counsel, the court ultimately consolidated both hearings, stating, "[d]oes March 25 at 1 work for everyone?" Both Mr. Nizetic and Ms. McKinnon responded in the affirmative, following which the Court issued an order: "Mr. Tatro, you're ordered to appear back in this court on March 25th at 1 and be ready for trial in this matter." As explained further herein, however, confusion later arose, including on the Court's part, about whether the matters had in fact been consolidated.
9. On or about February 3, 2016, Mr. Nizetic received a scheduling notice from the Court indicating that the hearing on the motion to impose sentence was still scheduled for February 10, 2016. At the time he

received the notice, Mr. Nizetic, who had handled 23 other hearings besides the Tatro hearing on January 14, had no recollection that the Court had consolidated that hearing with the March 25 trial at the TMC, nor had the Court ever sent out an order evidencing its January 14, 2016 TMC consolidation decision.

10. On February 4, 2016, Ms. McKinnon sent an email to Mr. Nizetic asking for his position on a motion to continue which proposed to consolidate the February 10 hearing on the motion to impose with the March 25, 2016 trial. Her request mirrored the relief that the Court had already granted at the TMC on January 14. Later on the same day, however, and before Mr. Nizetic had the opportunity to respond, she emailed Mr. Nizetic again, as follows: "Please disregard my previous email regarding a continuance of the Feb. 10 motion hearing. The court had already rescheduled for the same time as his March trial."
11. On the following day, Mr. Nizetic sent an email to the clerk of court, as follows: "Jen. My scheduling notice indicates this matter is scheduled for a hearing on 10 FEB @ 0900. Atty. McKinnon is claiming it has been rescheduled and consolidated with his trial on March 25. Is she correct?" Three days later, on February 8, 2016, the clerk responded, indicating that "the computer is still showing it scheduled for 2/10 at 9:00 am."
12. Ms. McKinnon was not copied on either email. Mr. Nizetic did not contact Ms. McKinnon after receiving the clerk's response to his inquiry

to notify her that the Court still had the hearing on its February 10, 2016 docket or to correct her apparent misunderstanding.

13. Mr. Nizetic appeared for the hearing at the Court at 9:00 a.m. on February 10, 2016. At the time, Mr. Nizetic had no recollection that the Court had consolidated the motion to impose hearing with the March 25 trial. In fact, Mr. Nizetic spent time preparing a witness for the motion to impose hearing, believing in good faith that the hearing was going to proceed.
14. Neither Ms. McKinnon nor her client appeared for the hearing. This result was understandable, given that Mr. Nizetic knew that Ms. McKinnon believed that the hearing was continued to March 25, as evidenced by her second email sent to him on February 4, 2016.
15. Likewise, through accident or mistake on the Court's part, the hearing had not been removed from the Court's docket, despite Judge Rappa's January 14, 2016 consolidation order from the bench.
16. At the hearing on February 10, 2016, Mr. Nizetic told the Court about Ms. McKinnon's emails of February 4 requesting a possible continuance then withdrawing the request on the same day. Mr. Nizetic did not, however, disclose *the reason* that Ms. McKinnon withdrew her request for a continuance; i.e., because she was under the impression that the motion hearing had been rescheduled for the same day as the trial in March.
17. Specifically, Mr. Nizetic stated:

Your Honor, as recently as February 4th, his counsel sent me an email and before I had a chance to respond to it, requesting a continuance of this particular hearing. And then at the last minute, within just a few hours afterward, said disregard the previous email regarding the continuance (sic).

At that time, I double checked with the Court and as of the day before yesterday, the Court indicated that no motion had been received, nothing had been rescheduled. As far as they knew, the matter was still on for trial. Accordingly, (I) notified the police department. Officer Cody's here on his day off, getting paid overtime by the police department to attend this hearing that was duly scheduled.

18. Mr. Nizetic requested that Ms. McKinnon be summoned to show cause why she should not be found in contempt. The Court (J. Rappa) granted Mr. Nizetic's request. In addition, the Court, sua sponte, issued an arrest warrant for the Defendant Mr. Tatro (Mr. Nizetic did not request the bench warrant). Unfortunately, the Court, too, had no recollection at the time of the February 10 hearing that it had previously consolidated the motion hearing with the March 2016 trial.
19. Later in the day on February 10, 2016, after learning that the Court had gone forward with the 9:00 a.m. motion hearing that day, Ms. McKinnon wrote to Mr. Nizetic, confirming her recollection that at the TMC, the Court had ordered that "both cases would be put on for the same date," i.e. continued to March 25. She also explained that she withdrew her request for a continuance upon review of a "note [in her file] on the notice saying that it had been moved to 3/25 at 1 pm. with the other case, which was also consistent with my memory of what was said at the [TMC] hearing." Believing that her failure to appear was a

misunderstanding, and knowing that Mr. Nizetic was aware of her misunderstanding but failed to so inform the Court, Ms. McKinnon asked Mr. Nizetic for his position on a motion to vacate the bench warrant.

20. Within half an hour of sending her email asking for, but not yet receiving, Mr. Nizetic's position on the motion to vacate, Ms. McKinnon filed the motion. It was granted the same day. Mr. Nizetic nonetheless responded to her request regarding his position, however, and did not assent to the motion to vacate. In part, he has noted that he did not assent to the motion to vacate because it had already been filed with the Court.
21. Ms. McKinnon thereafter filed a motion for sanctions against Mr. Nizetic on February 19, 2016. Her motion was heard on March 25, 2016, and the Court issued an order on June 21, 2016. In its order of June 21, 2016, the Court found that Mr. Nizetic knew that Ms. McKinnon was under the impression that the February 10, 2016 hearing had been continued to March 25, 2016 and he should have alerted the Court to her obvious confusion over the issue. The Court decided it could not impose any sanction other than to make a judicial referral to the ADO.
22. Mr. Nizetic regrets deeply his conduct at the February 10 hearing. He also acknowledged in the March 25 hearing before Judge Rappa that he "probably should have double-checked with her (Ms. McKinnon)" after learning that the Court had the motion hearing scheduled on February 10, despite Ms. McKinnon's understanding to the contrary. He has

acknowledged his misconduct to the ADO. In hindsight, Mr. Nizetic believes he acted hastily and in a spirit of suspicion towards the PD's Office, a distrust based on what he describes as several unpleasant past dealings with the PD's office. This distrust, along with his good faith belief on February 10, 2016 that the motion to impose hearing was still scheduled to be heard and confirmation of the same by the Court, and his lack of any recollection that the hearing and the March trial had been consolidated, combined to cloud his judgment. He acknowledges it was unprofessional and improper to allow this distrust and any confusion about the consolidation to affect his request for relief before a Court.

B. Disciplinary Rules Violated

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

Rule 3.1: Meritorious Claims and Contentions

24. The facts set forth at ¶¶ 1-22 above are incorporated by reference.
25. Rule 3.1 states as follows:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or institutionalization, may nevertheless so defend the proceeding as to require that every element of the case be established.

26. Mr. Nizetic violated Rule 3.1 when he requested a show cause hearing for Ms. McKinnon regarding her failure to appear on February 10 which had no basis in law or fact, given his knowledge of Ms. McKinnon's stated belief that the motion to impose had been consolidated with the March 25 willful concealment trial.

Rule 8.4(a): General Rule

27. Having found the foregoing violation, there is clear and convincing evidence that Mr. Nizetic's conduct, as described herein, violated N.H. R. Prof. Conduct 8.4(a).

C. Recommended Sanction

28. The Attorney Discipline Office and Mr. Nizetic jointly agree that a public censure is the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.

29. Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support this sanction.

30. 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).

31. 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.

32. 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.*
33. Under the first prong of the analysis, Mr. Nizetic violated duties owed to legal system when he sought relief from the Court – a show cause order - which had no basis in law or fact.
34. With respect to Mr. Nizetic’s mental state under the second prong of the sanction analysis, the parties agree that Mr. Nizetic’s mental state was knowing. That is, Mr. Nizetic knew that Ms. McKinnon was laboring under the impression that the motion hearing had been consolidated with the March trial, but did not elaborate upon his knowledge of that impression when explaining how he had confirmed his own

understanding that the motion hearing was still on the Court's February 10, 2016 docket.

35. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Nizetic's misconduct. Mr. Nizetic's conduct caused actual injury to Ms. McKinnon, who was forced to move to vacate the bench warrant and respond to the order to show cause. It also prejudiced the legal system in that judicial resources were expended for the sanction hearing.

36. Mr. Nizetic's Rule 3.1 violation implicates Section 6.2 of the *Standards*.

That Section provides:

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

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.

(emphasis added).

37. Mr. Nizetic's conduct in this matter – that is, failure to disclose Ms. McKinnon's impression about the consolidation of the February 10 motion hearing with the March 25 trial, when considered under *Standard* 6.22, would call for a baseline sanction of suspension. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g., Conner's Case*, 158 N.H. at 303.
38. In this case the only aggravating factor present is Mr. Nizetic's substantial experience in the practice of law. *See Standards* § 9.22. Mitigating factors include (a) the absence of prior discipline, (b) full and free disclosure to the ADO, and (c) remorse. *See Standards* § 9.32.
39. The parties agree that the aggravating and mitigating factors in this case merit a downward departure from suspension to public censure. A public censure serves the purposes of discipline and is an appropriate sanction under the circumstances of this case.

D. Costs

40. Subject to the PCC's approval of Mr. Nizetic's Stipulation, Mr. Nizetic agrees to pay the costs incurred by the ADO in the investigation and enforcement of this disciplinary matter. *See Supreme Court Rule* 37(19).

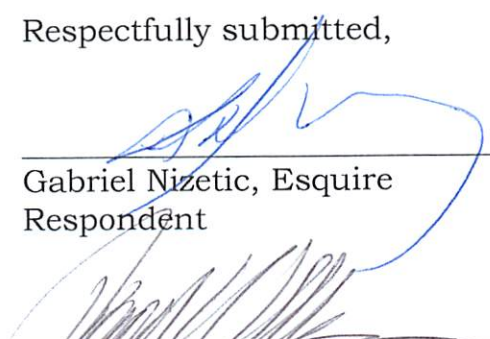
His agreement to pay the costs incurred by the ADO is the subject of a separate agreement signed by Mr. Nizetic.

E. Effect of Stipulation

41. Mr. Nizetic understands that this Stipulation represents a recommended disposition, and that the PCC may accept, reject, or conditionally accept the Stipulation pursuant to Rule 37A(III)(aa)(1).
42. Mr. Nizetic 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 understands that he has a right to obtain counsel regarding this Stipulation and, that he is fully aware of the consequences of the Stipulation.
43. Mr. Nizetic knowingly and intelligently waives his right to a hearing.

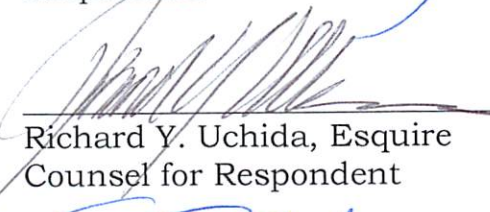
Respectfully submitted,

Dated: 17 FEB 17 2017



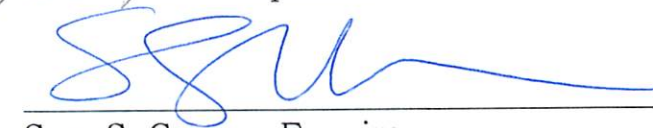
Gabriel Nizetic, Esquire
Respondent

Dated: Feb. 21 2017



Richard Y. Uchida, Esquire
Counsel for Respondent

Dated: 22 Feb. 2017



Sara S. Greene, Esquire
Disciplinary Counsel



**NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE**

Nizetic, Gabriel

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#16-026

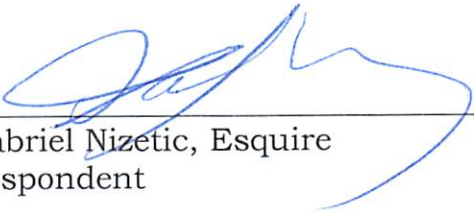
**AGREEMENT TO PAY COSTS
OF DISCIPLINARY MATTER**

1. Subject to the Professional Conduct Committee's approval of the Stipulation of Facts, Rule 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 February 6, 2017, I have been informed that the costs are approximately \$55.75. Should further costs accrue in this disposition of this matter, I understand that the Committee will bill me for these costs. If I dispute the bill, I will notify the Committee of the specific nature of the dispute in writing within thirty days of my receipt of the bill. I understand that the Committee will consider the disputed item and issue a written decision. If I do not notify the committee that I dispute the bill, payment will be due upon its receipt.

3. 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.
4. 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.
5. 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).
6. I also agree to be responsible for all costs incurred as a result of the Attorney Discipline Office's collection efforts.

Respectfully submitted,

Dated: 17 FEB 17 2017



Gabriel Nizetic, Esquire
Respondent