New Hampshire Supreme Court

Professional Conduct Committee

a committee of the attorney discipline system

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Grau, Charles W. advs. Attorney Discipline Office - #13-033

REPRIMAND AND ORDER ON COSTS

On November 14, 2017, the Professional Conduct Committee ("the Committee") deliberated the Stipulation as to Facts, Violations and Sanction and the Agreement to Pay Costs of Disciplinary Matter. Members present included David M. Rothstein, Chair; Elaine Holden, Vice Chair; Susan R. Chollet; Richard H. Darling; Margaret R. Kerouac; Mona T. Movafaghi; Edward D. Philpot, Jr.; Georges J. Roy; and Martha Van Oot. Heather E. Krans, Vice Chair, and Caroline K. Leonard were absent. Peter G. Beeson was recused.

The Committee voted to reject the stipulation as submitted, but informed the parties that it would reconsider a revised stipulation.

On January 16, 2018, the Professional Conduct Committee ("the Committee") deliberated the Revised 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; Kathleen Ames; Caroline K. Leonard; Mona T. Movafaghi; Edward D. Philpot, Jr.; Georges J. Roy; and Martha Van Oot. Margaret R. Kerouac was absent. Peter G. Beeson was recused.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that Charles W. Grau's conduct violated Rules of Professional Conduct 1.7 and 8.4(a), as stipulated.

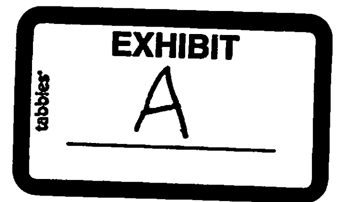
The Committee also concluded that a Reprimand is appropriate. Its sanction is in accord with the purposes of attorney discipline. *See, e.g., Conner's Case*, 158 N.H. 299, 303 (2009); *Richmond's Case*, 152 N.H. 155, 159-60 (2005). The sanction is also in accord with the *ABA Standards for Imposing Lawyer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

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

January 16, 2018

David M. Rothstein
Chair

cc: Elizabeth M. Murphy, Assistant Disciplinary Counsel
James C. Wheat, Esquire
Philip T. Utter, Chair, Hearings Committee
File



NEW HAMPSHIRE SUPREME COURT

PROFESSIONAL CONDUCT COMMITTEE

Grau, Charles W.

advs.

Attorney Discipline Office

#13-033

REVISED STIPULATION AS TO FACTS, VIOLATIONS, AND SANCTION: REPRIMAND

Respondent Charles W. Grau, Esq. ("Mr. Grau"), and the Attorney Discipline Office ("ADO") stipulate as follows:

A. Background Facts and Procedural History

1. Mr. Grau is an attorney licensed to practice law in New Hampshire. Mr. Grau was admitted to practice on June 9, 1997.
2. At all times material to this proceeding, Mr. Grau practiced law at Upton and Hatfield, LLP, 10 Centre Street, P.O. Box 1090, Concord, New Hampshire, 03302-1090.
3. Mr. Grau has previously been admitted to practice law in Wisconsin in 1977 and Illinois in 1983. Mr. Grau's status in Wisconsin is inactive and in good standing. His status in Illinois is inactive and in good standing.
4. Mr. Grau does not have a prior disciplinary history.
5. This matter arises from an April 1, 2013 referral from the Clerk of the Merrimack County Superior Court, pursuant to RSA 311:8. In a pending

legal malpractice action (*Cheryl C. Moore, MD v. Charles W. Grau, et al., Case NO. 217-2013-CV-00150),* Dr. Cheryl Moore ("Dr. Cheryl Moore") alleged that Mr. Grau and his firm, Upton Hatfield, LLC, *inter alia,* had engaged in legal malpractice while representing her in a dispute with Wentworth-Douglass Hospital ("WDH"). Dr. Cheryl Moore did not file a complaint with the ADO against Mr. Grau.

6. On October 19, 2016, the Court (McNamara, J.) granted the defendants' Motion for Summary Judgment. The Court denied the plaintiff's motion for reconsideration on December 14, 2016. Thereafter, the plaintiff appealed the decision to the Supreme Court and the Court accepted the appeal on January 30, 2017. The plaintiff filed a brief on May 8, 2017. The defendants' brief was filed on June 22, 2017. A brief for Wentworth-Douglass Hospital was filed on that same date. Oral argument is anticipated to be re-scheduled in the near future.

7. With respect to the disciplinary matter, on June 30, 2017, the ADO filed a Notice of Charges. On August 1, 2017, Mr. Grau filed an Answer to the Notice of Charges. Assistant Disciplinary Counsel filed a request for a hearing on August 2, 2017. On that same date, Mr. Grau filed a request that the matter be deferred until the underlying malpractice action could be resolved because his law firm, Upton and Hatfield ("Upton firm"), not only Mr. Grau, was a named Defendant in the action. On August 4, 2017, Assistant Disciplinary Counsel filed Mr. Grau's request with the Chair of the Hearings Committee, Philip H. Utter, for review and a

decision. The ADO did not object to the request but asked for 60 day updates of the status of the malpractice action. On August 10, 2017, Chair Utter denied the request for a stay. Mr. Grau filed a Motion to Reconsider on August 21, 2017. Separately, on August 21, 2017, the parties filed a Joint Motion to Stay Appointment of a Hearing Panel to Allow Time to Finalize Stipulation requesting 60 days to finalize and file this dispositive Stipulation with the Professional Conduct Committee. On August 23, 2017, Chair Utter granted the Joint Motion to Stay.

8. On November 2, 2017, the parties submitted to the Professional Conduct Committee ("PCC") a Stipulation as to Facts, Violations, and Sanction: Reprimand and Motion for Protective Order. On November 15, 2017, the PCC issued an Order denying the parties' Motion for Protective Order.

9. The parties now submit this Revised Stipulation without the request for a protective order. The parties affirmatively agree this stipulation is not an admission of liability for civil purposes, nor is it a determination by the Attorney Discipline Office of the existence or absence of any possible civil liability. This Revised Stipulation is for purposes of resolving the litigation pending with the ADO only.

B. Underlying Facts

10. By way of further background, for many years, Young & Novis Professional Association, d/b/a Piscataqua Pathology Associates ("Y&N") had a contractual relationship with WDH to provide pathology services. This relationship ended when, in 2009, WDH decided not to renew their

contract, requiring Y&N to close its practice and vacate the hospital premises, effective February 28, 2010.

11. Dr. Cheryl Moore and Dr. Glenn Littell ("Dr. Littell") were principals of Y&N at the time. Gregory Wirth, Esq. was their business counsel.

12. In the fall of 2009, Mr. Grau and the Upton firm were retained by Y&N and its principals, Dr. Cheryl Moore and Dr. Littell, following a request for assistance from Mr. Wirth.

13. At that time, Y&N was contemplating litigation against WDH for retaliation against Y&N for having reported HIPPA violations relating to a 2007 security breach to WDH administrators and for insisting that said violations be reported to the NH Attorney General's office and the Department of Health and Human Services. All of the underlying events which caused Y&N to contemplate litigation occurred before Mr. Grau's involvement.

14. On October 23, 2009, Mr. Grau sent an engagement letter on behalf of Upton & Hatfield to Dr. Cheryl Moore and Dr. Littell. The letter was regarding Young-Novis, P.A., Dr. Glen Littell and Dr. Cheryl Moore v. Wentworth-Douglass Hospital and Gregory Walker (President and CEO of WDH), confirming representation "in connection with the above and any related matters." A copy signed by Dr. Littell as President of Y&N, Dr. Littell, personally, and Dr. Cheryl Moore, personally, was returned to Upton and Hatfield via fax on October 30, 2009.

15. Mr. Grau recalls that at the time of retention, as was routine, the possibility of future conflicts was discussed with the clients. However, Mr. Grau did not request that the clients confirm their informed consent in writing to the representation of the business as well as Dr. Littell and Dr. Cheryl Moore. The clients were told that while Mr. Grau did not see that there were conflicts between them at the time, he explained conflicts could develop and that they would be dealt with if and when they arose. Mr. Grau did not seek confirmation in writing at the time because it was his determination that there was no significant risk that the representation would be materially limited in any way. Mr. Wirth also continued to represent all clients.

16. On or about November 20, 2009, the clients, contrary to advice given by Mr. Grau and Mr. Wirth, went to the press and claimed that WDH was not renewing Y&N's pathology contract as retaliation for the clients' insistence that WDH report the 2007 security breach.

17. The local newspaper published a series of articles and editorials highly critical of WDH and its senior management for their treatment of the 2007 security breach.

18. On or about February 11, 2010, acting on a complaint filed with the College of American Pathologists ("CAP") by Dr. Thomas Moore alleging that the hospital had failed to report the security breach, the same breach the clients believed led to the nonrenewal of Y&N as the hospital's

pathologists, CAP issued a report placing the pathology lab on probation, citing inadequate supervision.

19. As a result of the adverse publicity from the clients' decision to air their grievances in the press, WDH publicly blamed the pathologists and Dr. Cheryl Moore by name for the probation. At the time, Dr. Cheryl Moore was the medical director of the pathology lab. Dr. Littell had been the medical director at the time of the security breach in 2007.

20. On February 18, 2010, Mr. Grau sent a letter to WDH, threatening legal action on behalf of Dr. Cheryl Moore for defamation on grounds that the hospital was systematically misrepresenting and distorting findings of the CAP report.

21. On February 28, 2010, Dr. Cheryl Moore, her husband, Dr. Thomas Moore, and Dr. Littell went to the Y&N offices at WDH to retrieve business property, personal items, Y&N patient files, and information and materials relevant to Y&N's disagreement with WDH over the termination. Dr. Cheryl Moore and Dr. Littell logged onto the hospital network using their respective passwords.

22. After logging on Dr. Cheryl Moore provided access to the network to her husband, Dr. Thomas Moore, who was not an authorized user of the network to copy and delete categories of documents they had agreed upon. Dr. Thomas Moore also used a software program he had purchased, "Drive Scrubber," to delete documents from the hospital network. Dr. Littell also used the "Drive Scrubber" software.

23. On March 29, 2010, WDH brought suit in Federal Court against Y&N and Drs. Cheryl Moore and Littell (the "Federal litigation" or "Federal law suit"). The matter was captioned: *Wentworth-Douglass Hospital, Plaintiff v. Young & Novis Professional Association d/b/a Piscataqua Pathology Associates, Cheryl C. Moore, M.D. and Glenn H. Littell, M.D., Defendants*, Civil Action No. 1:10-cv-00120-SM (United States District Court for the District of New Hampshire).

24. In the Complaint, WDH alleged that: 1) the defendants had not sought or obtained authority to "remove, delete, alter or copy records of any type, including electronic data, from WDH;" 2) the defendants' removal of documents and data violated the hospital's policy regarding security and confidentiality; 3) the defendants violated the Computer Fraud and Abuse Act ("CFAA") by intentionally obtaining unauthorized access to the hospital's network and removing information and data with the use of commands or codes and removable storage devices; 4) the defendants violated CFAA by installing "DriveScrubber" software used to permanently erase files and documents from computer network devices; and 5) the defendants engaged in conspiracy pursuant to 18 U.S.C. 1030(b).

25. After the Federal lawsuit was filed, Mr. Grau and others within the Upton firm were in regular contact regarding the suit with Dr. Cheryl Moore, Dr. Littell and also with Dr. Thomas Moore and with Mr. Wirth.

26. Mr. Grau and the Upton firm entered an appearance for each of the defendants, filed an Answer on August 10, 2010, and filed counterclaims on behalf of Dr. Cheryl Moore and Dr. Littell, for invasion of privacy (false light) and defamation (retaliatory and malicious publication of falsehoods regarding their conduct on February 28, 2010).

27. Mr. Grau and his clients did not enter into a new engagement agreement in connection with the defense of the Federal litigation and Mr. Grau did not seek additional informed consent, confirmed in writing, to the joint representation. Mr. Grau did not feel the need to do so at that stage of the representation because he had discussed the possibility of conflicts arising upon assuming representation and he believed nothing had changed simply because suit had been instituted.

28. The Federal law suit was amended on March 24, 2011, to add Dr. Thomas Moore as a co-defendant. At that time, WDH added a consumer protection claim and alleged specifically that Dr. Thomas Moore had installed the DriveScrubber and worked with Dr. Littell to download electronic data from certain hard drives, using Dr. Cheryl Moore's username and password.

29. Mr. Grau and the Upton firm accepted representation of Dr. Thomas Moore, in the defense of the Federal law suit that was brought against him. In doing so he confirmed with Dr. Cheryl Moore that Dr. Thomas Moore's actions on February 28, 2010, were conducted pursuant to authority she had extended. That discussion was confirmed in an email

dated September 4, 2011. While Dr. Cheryl Moore and Dr. Littell were aware and accepted Mr. Grau's joint representation of them, their business and Dr. Thomas Moore, the clients did not individually provide confirmation in writing regarding the joint representation. Mr. Grau did not seek written confirmation because he did not believe that there was a significant risk of material limitation in his representation of his clients.

30. As the Federal litigation progressed, there were, at times, potentially divergent interests among Mr. Grau's clients. The various interests were known by Mr. Grau or were discovered before the Federal lawsuit went to trial in August 2012. As examples:

    (a) WDH's CFAA claims in the Federal lawsuit included the improper use of the "Drive Scrubber" which was used by Dr. Littell and Dr. Thomas Moore, but not by Dr. Cheryl Moore, though she had authorized her husband's use and was sued as a co-conspirator.

    (b) Dr. Littell admitted, in responding to interrogatories, that he and Dr. Thomas Moore had installed "DriveScrubber" on the computers in question and "downloaded personal and proprietary files and documents and emails, including communications with [their] attorneys from the C-drive (local drive) . . . onto removable storage devices." Dr. Cheryl Moore did not participate in this conduct and thus did not have the same liability, though she had liability as a co-conspirator.

(c) Moreover, CFAA is not a "strict liability" statute, but imposes liability based on a requisite mental state of a person in committing certain acts. As such, each defendant's subjective motivations and intent were relevant in determining liability under the CFAA, though the statute required evidence only of a general intent to take or destroy data.

(d) Dr. Cheryl Moore was the only doctor specifically named by the WDH for having inadequately supervised the pathology lab and causing it to be put on probation, although Dr. Littell had been the medical director of the lab at the time of the security breach that was the subject of the complaint to CAP. In Mr. Grau's February 18, 2010, letter to WDH counsel, Mr. Grau's complaints of false and malicious misstatements, systematic misrepresentation, and defamation, including requests for retraction, only referenced Dr. Cheryl Moore, though both she and Littell asserted false light Counterclaims based on WDH published statements regarding the probation. Dr. Littell's claim was later dismissed.

(e) Throughout the litigation, Dr. Cheryl Moore preferred an aggressive defense against WDH's allegations and wanted an aggressive prosecution of her Counterclaims in an effort to repair the damage she felt had been done to her professional reputation. This was particularly important to her because as of the September 2012 trial, she had not secured comparable employment. Additionally,

she and her husband wanted to remain in the New Hampshire area and continue their respective medical practices locally. Dr. Thomas Moore also preferred an aggressive defense and pursuit of his wife's Counterclaims.

(f) Dr. Littell had secured employment in California and had moved there. When Mr. Grau asked him whether his move to California caused him to reconsider an aggressive defense and prosecution of Counterclaims and whether to possibly settle separately, he confirmed his intention to stay the course. Mr. Grau did not confirm this in writing with Dr. Littell. Dr. Littell did not favor settlement over trial until after the final pretrial conference of August 10, 2012, when he learned that the presiding judge had indicated that he might allow evidence of Dr. Littell's computer use and extramarital writings into evidence on the issue of his mental distress damage claim in his defamation Counterclaim, and that the judge felt that damages for the defamation and false light claims would be roughly the same as the damages to be awarded WDH for damage caused to their computer network.

(g) In the early stages of litigation, it was discovered that the materials downloaded from Dr. Littell's computer included pornography and suggestive correspondence regarding a woman who was not his wife, at least potentially compromising his ability to aggressively pursue his defamation claims and defend the CFAA claims. Until

the August 10, 2012, final pretrial conference, Mr. Grau believed that such evidence would be excluded from evidence because its prejudicial effect far outweighed its probative value. He expressed this view to the clients, and to Mr. Wirth, but he did not confirm it in writing.

31. Significant litigation continued for many months in the Federal litigation.

32. Leading up to a trial, scheduled for August 2012, Mr. Grau successfully secured the dismissal of WDH's consumer protection claim and one of the claims under the CFAA; defeated WDH's motion to dismiss counterclaims and two of its motions for summary judgment (except as to Dr. Littell's false light claim); and secured separate legal counsel for the clients regarding the criminal implications of the CFAA claims.

33. Peter Anderson, Esq. of the McLane Middleton law firm successfully dissuaded the government from pursuing criminal prosecution of any of the defendants. Mr. Anderson also represented all three individual defendants.

34. Mr. Wirth also remained actively involved in the Federal litigation. He participated in client meetings and decision-making regarding the litigation.

35. The Court also dismissed one of two counts of the Federal complaint (for intentional acts in violation of CFAA) against all clients but Dr. Thomas Moore. The conspiracy count against all defendants remained pending.

36. Throughout the litigation, Dr. Thomas Moore arguably faced a greater risk of liability because he was not part of Y&N; did not have authority to use hospital computers; but had, nonetheless used the "DriveScrubber," whereas Dr. Cheryl Moore, who had the authority to access the hospital database, had not used the DriveScrubber though she remained subject to liability under the conspiracy count. Dr. Littell had also used the DriveScrubber software.

37. Dr. Littell's interests diverged from the interests of the Moores when his false light claim was the subject of summary judgment in favor of WDH, though his defamation claim survived summary judgment.

38. Dr. Littell ultimately agreed to withdraw his defamation claim when the court indicated that evidence of his extra-marital communications likely would be admissible at trial. Upon withdrawing this claim, Dr. Littell agreed to continue on to trial, eliminating the conflict that arose when following the final pretrial conference, he authorized the negotiation of a settlement, whereas the Moores withdrew such authority after having first extended it.

39. At the time of trial Dr. Cheryl Moore's defamation and false light Counterclaims were the only Counterclaims left to prosecute.

40. Mr. Grau's failure to adequately address conflicts of interest at the outset of the representation and during the litigation led to difficult discussions between him and his clients during the summer of 2012.

41. After the final pretrial conference, on August 10, 2012, during which the Court suggested that verdicts would be rendered that would essentially offset each other, Mr. Grau and opposing counsel, William Christie, Esq. ("Mr. Christie") of the Shaheen & Gordon law firm, agreed to discuss with their clients' a "walk-away" settlement as suggested by the judge during the conference.

42. Later in the day, Mr. Grau advised all of the clients that the subject of a "walk-away settlement" with the hospital had been broached by the judge at the conference and discussed with counsel for the hospital.

43. On August 10, 2012, Dr. Thomas Moore emailed Mr. Grau asking why Dr. Littell's "porn problems necessarily have to include me?" Further, he wondered how the hospital could suddenly come up with a claim for $50,000-$60,000 in damages.

44. On August 10, 2012, Dr. Cheryl Moore instructed Mr. Grau not to work on her case, stating, in an email at 6:50 p.m.: "besides sending along the in limine stuff, please do not do any more work on my cases."

45. Mr. Grau replied to Dr. Cheryl Moore that until the case is settled, if that is what happens, we will have no choice but to continue to prepare for trial. . . . The two things that changed were the judge's comments on the merits and the damages, and his likely admission of testimony regarding "Glenn's [Dr. Littell's] pornography."

46. Later that evening, at 8:59 p.m., Dr. Cheryl Moore stated, in an email: "I also thought that you were supposed to keep my best interests as

important as glenns [sic] best interests. It may be time for Glenn to walk away, but it may not be time for me to walk away."

47. Mr. Grau forwarded the email to Russell Hilliard, Esq. (a partner in the Upton firm) and Lisa Hall, Esq. (an Upton firm associate working on the matter), stating: "We need to consider separate counsel."

48. Mr. Grau also responded to Dr. Cheryl Moore as follows: "Yes. We must consider whether you and Glenn need separate counsel."

49. At 9:01 p.m., Dr. Cheryl Moore sent Mr. Grau a lengthy email, voicing her frustrations with her case and advising that she would not agree to settle for a "walk-away" settlement without some kind of financial compensation. In relevant part, she stated: "I have never wavered in my desire to finish this, the worst thing that has ever happened to me. . . ."

50. Mr. Grau emailed Mr. Hilliard that evening requesting a time to talk. They scheduled a time to speak on Saturday afternoon, August 11th regarding the case and the client's concerns.

51. On August 11, 2012, Dr. Thomas Moore emailed Mr. Grau, in the morning, regarding, "Glenn's reaction to the news last night." After a discussion Mr. Grau had with the Moores, Dr. Thomas Moore emailed Mr. Grau, in the afternoon, stating: "Cheryl and I agree to begin negotiations with WDH to settle the CFAA case and other pending cases/claims/counterclaims. Keep us posted."

52. After a similar discussion with Dr. Littell, on August 11, 2012, regarding settlement, Mr. Grau emailed Dr. Littell stating:

> I just wanted to confirm in writing that you have authorized us to begin negotiating a settlement with WDH on this and the other outstanding claims . . . Cheryl and Tom have agreed, and Tom has sent a confirming email to you. Please call me with any questions. I am putting a call into Christie.

53. On August 13, 2012, Mr. Grau emailed all of the clients to advise them that the hospital was "on board with a walk-away settlement." He also described the proposed conditions (including language to write regarding the defamation and false light claims; confidentiality; non-disparagement; return of hospital data; Dr. Thomas Moore to relinquish hospital privileges; and mutual releases).

54. Mr. Grau advised:

> While there are details that must be worked out, a settlement along these lines is in the best interests of all three of you -- Cheryl, Tom, and Glenn -- for all the reasons we have been discussing. Foremost among these is that by the hospital dropping its claims, all of you are exonerated of violating the CFAA, as they are dismissing them with prejudice.

55. Mr. Grau and the clients planned to meet by phone to discuss the proposal. Mr. Grau wanted Mr. Wirth to participate as well.

56. Separately, Mr. Grau discussed with Mr. Hilliard and Ms. Hall the possibility of withdrawing from the representation of his clients if the clients could not come to a mutual agreement as to the terms of settlement.

57. A draft pleading, Motion for Leave for Mandatory Withdrawal, articulating the conflict was prepared to be filed with the Court if an agreement to settle could not be reached among the clients.

58. In an August 14, 2012 email to Mr. Grau, with copies to Dr. Thomas Moore, Dr. Littell, Ms. Hall and Mr. Hilliard, Dr. Cheryl Moore stated:

> As of late yesterday, Attorney Grau told me that he had an obligation to bring us to trial if that is what we wanted to do. That was part of the agreement we signed with the firm 2.5 years ago for representation. We understood there was a potential conflict of interest when it was discussed with us about 2 years ago. We were not advised to separate our cases at that time. We did not know that the conflict could be used as a way to force us into a type of settlement that was never discussed and which we were not even aware existed. We were not aware that the firm could abandon us 1 week before a federal trial for which Attorney Grau and Attorney Hall have been defending us and preparing us for 2.5 years. We have been paying our bills as quickly as has been feasible for us. We want to bring our case to trial on August 21 as it is scheduled. We have complete confidence in both of them to represent our interests.

59. Mr. Grau replied to the email as follows:

> I made it quite clear that all clients had to agree on the same course. We have spoken with Glenn, and I believe he intends to call you. We have had discussions about possible conflicts at the outset and as issues arose throughout the course of representation. There was no need to have separate representation as everyone was on the same page. When potential issues arose, they were addressed such that people were on the same page. No one is forcing you into a settlement, though I think it is in your best interest. I just can't have clients going in different directions that would force us to violate duties to one by acting for others. That situation didn't arise until Friday.

60. Later in the day on August 14, 2012, Mr. Grau advised his clients that Dr. Littell had authorized the withdrawal of his defamation claim and wanted to proceed to trial with the others. "This removes the conflict, we will not be forced to file the motion we discussed this morning, and will

continue the trial preparations . . . . despite the difficult discussions of the past few days."

61. Dr. Cheryl Moore also confirmed her rejection of the current proposal, but authorized Mr. Grau to negotiate "a financial settlement if a serious financial offer is made in good faith and you inform me."

62. In an email on August 15, 2012, Mr. Christie stated that he and Mr. Grau worked on a proposed settlement with additional conditions (mutual releases, withdrawal of the Moores' hospital privileges, confidentiality and non-disparagement), following which Mr. Grau had reported that his clients had withdrawn settlement authority.

63. Mr. Christie indicated in the August 15 email, his opinion, that Mr. Grau's joint representation posed a conflict, at this point making settlement with one or two of the defendants difficult and offering to settle with all defendants. However, the only settlement demand that WDH had made prior to the final pretrial conference was to all four clients collectively.

64. In an email discussion with his clients regarding the WDH settlement offer, Mr. Grau stated: "I am not engaging in that discussion with him. There was a conflict of interest. It was resolved. It could arise again."

65. Dr. Cheryl Moore confirmed in a subsequent email to Mr. Grau that he had "authority to negotiate an offer with substance."

66. Mr. Grau offered the opinion that the proposal in question was one of substance, but without offering to pay Dr. Cheryl Moore damages.

67. Mr. Grau believed, based on demands made by WDH and representations made by its counsel prior to the final pretrial, that WDH had no interest in voluntarily paying damages to Dr. Cheryl Moore in any amount.

68. Upon review of the draft conditions, Dr. Cheryl Moore and Dr. Thomas Moore withdrew their authority to settle.

69. Trial of the case began on August 21, 2012.

70. On August 24, 2012, the parties reached a settlement of the case (for mutual releases, and provisions for confidentiality and non-disparagement) and the trial was suspended.

71. On August 24, 2012, Dr. Cheryl Moore sent an email to Mr. Grau stating: "I am sorry this may have ruined your birthday. I hope you can celebrate this weekend . . . You spent it fighting the good fight and we appreciate it." In another email, she wrote: "Thank you for defending us and getting us freed up from the CFAA charges. It's win for all of you, you should be pleased."

72. On August 30, 2012, Dr. Cheryl Moore expressed displeasure with the settlement document she was asked to sign, in part because of some additional concerns raised by the hospital regarding computer access and security measures, and because she thought trial had not proceeded far enough.

73. Mr. Grau responded on August 31, 2012, advising that the agreement was binding and fully authorized after extensive discussion and

explanation; each client faced a material risk of being found liable for a CFAA violation, with additional harm to their professional lives; while Dr. Cheryl Moore might have recovered damages, her counterclaims "had issues" and proof of hospital damages could have produced a wash. Further, subject to appropriate "tweaks" in the language, refusal to sign would result in a motion to enforce settlement in connection with which Mr. Grau would likely have to testify.

74. Dr. Cheryl Moore and Dr. Thomas Moore retained Peter Callaghan, Esq. ("Mr. Callaghan") of Preti Flaherty to advise them regarding the settlement, prior to September 12, 2012. The final settlement agreement was executed on September 20, 2012.

75. Dr. Cheryl Moore later brought the malpractice suit against Mr. Grau and his firm.

76. The clients paid the Upton firm legal fees for their work on the case based on the significant effort expended by him and his firm.

C. Disciplinary Rules Violated

77. The parties agree that Mr. Grau's conduct in this case violates New Hampshire Rules of Professional Conduct 1.7 and 8.4(a).

Rule 1.7: Conflicts of Interest

78. The facts set forth above are incorporated by reference.

79. Rule 1.7 states as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

80. Mr. Grau had a duty of loyalty under Rule 1.7 to avoid conflicts of interest.

81. Mr. Grau breached this duty when, after explaining that conflicts of interest could arise, he accepted the defenses of Y&N, Dr. Cheryl Moore, Dr. Littell and Dr. Thomas Moore simultaneously and continued that representation through trial but failed to adequately confirm his clients informed consent in writing.

82. There was a significant risk that Mr. Grau's representation of Y&N, Dr. Cheryl Moore, Dr. Littell and Dr. Thomas Moore would be materially limited by the representation of all clients, an issue that could have been addressed by the clients providing their informed consents confirmed in writing, but Mr. Grau failed to obtain written confirmations.

83. The significant risks that could have materially limited Mr. Grau's representation of all clients included, but was not limited to the following:

(a) Each of Mr. Grau's clients had performed different roles, taken differing actions, and arguably had varying degrees of potential liability for their actions on February 28, 2010.

(b) Dr. Cheryl Moore had potentially stronger counter-claims than Dr. Littell did, and Dr. Thomas Moore did not have any counter-claims.

(c) Dr. Littell and Dr. Thomas Moore had used the "DriveScrubber" software, whereas Dr. Cheryl Moore had not used the software but had authorized her husband to delete documents from her computer utilizing her password.

(d) Dr. Thomas Moore, a non-employee of Y&N, had potentially the greatest liability of all of the defendants in the Federal lawsuit, although liability could also be imputed to the other defendants.

(e) Dr. Cheryl Moore had personal reasons for pursuing the case to trial, including a desire for vindication and an interest in employment in the New Hampshire area. Dr. Thomas Moore was similarly motivated.

(f) Dr. Littell had already moved to California and secured other employment. While Mr. Grau confirmed orally with Dr. Littell that this did not diminish his intent to continue to aggressively

pursue the litigation through trial, he did not confirm this in writing.

(g) Dr. Littell had a greater interest in settlement than the other clients once it was known that evidence of extramarital writings on his computer would be admissible at trial, and he also had liability for having used the Drive Scrubber software.

(h) The representation of all defendants made settlement for all defendants more problematic once opposing counsel raised the possibility of a conflict of interest and would only reach a settlement if all defendants would settle.

(i) The potential that one defendant, Dr. Cheryl Moore, in particular, would have been able to secure a better settlement if she and the other defendants did not share counsel.

84. While the clients were aware of the joint representation, the clients did not provide informed consent confirmed in writing to the shared representation.

85. The parties agree that there is clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.7(b).

Rule 8.4(a): General Rule

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

D. Recommended Sanction

87. The Attorney Discipline Office and Mr. Grau jointly recommend a reprimand as the appropriate sanction in this matter. This sanction would serve the purposes of attorney discipline.

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

89. 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).

90. 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.

91. 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").

92. Under the first prong of the analysis, Mr. Grau violated the duty of loyalty owed to clients by failing to avoid a conflict of interest. *See Standards* § 4.3.

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

94. The *Standards* defines the mental state of negligence as "when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that reasonable lawyer would exercise in the situation."

95. 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 *Standards* define "knowledge" as a "conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result." *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.").

96. Mr. Grau's conduct was knowing in that he was at all times aware of his clients' status as co-defendants and was aware of the various issues with respect to each individual's interests throughout the course of the litigation. Mr. Grau's conduct was primarily negligent in that he did not appreciate the need to confirm in writing the informed consent of all clients to their concurrent representation.

97. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Grau's misconduct.

98. Mr. Grau's conduct caused potential injury to his clients' matter in that the representation was not conflict free and the co-defendants were not sufficiently informed as to the risks of the joint representation.

99. Mr. Grau's violation of Rule 1.7 implicates Section 4.3 of the *Standards*, which provides, in pertinent part:

> 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[1] [public censure] is generally appropriate when 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 [reprimand] 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.

100. Under the foregoing circumstances, the parties agree that the baseline sanction is either a public censure or a reprimand. *See* § 4.33-4.34.

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

102. In this case, there is one applicable aggravating factor: Mr. Grau's substantial experience in the practice of law. *See Standards* § 9.22. There are mitigating factors 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. *See Standards* § 9.32.

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[1] 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.

103. The parties agree that the mitigating factors, combined with the baseline sanction analysis, indicate that a reprimand will serve as an appropriate sanction in this matter.

104. This sanction is proportional to other cases where a conflict of interest has existed. For example, the New Hampshire Supreme Court recognized a public censure as the baseline sanction where a respondent negligently failed to appreciate the risk of a conflict of interest and caused injury or potential injury to a client. *See Shillen's Case*, 149 N.H. 132, 140 (2003) (imposing public censure as baseline sanction for negligently violating conflict rules where respondent represented husband and wife against auto insurer where husband's speeding could have contributed to wife's injuries, and noting that "[w]hile . . . respondent . . . should have recognized the conflict of interest . . . there is no evidence that he acted with a dishonest or selfish motive, he has no prior disciplinary record, and there is substantial evidence in the record of his good character and reputation.")[2] In another conflict of interest case, the Professional Conduct Committee issued a reprimand to a respondent who undertook to represent two people having separate claims against the same person, without undertaking an analysis of whether there was a risk that his duty to one client would be materially limited by his responsibilities to the other client, and to the extent he reasonably believed he could represent both clients, he failed to obtain

[2] *Shillen's Case* was decided under a prior version of Rule 1.7.

written informed consent from them. Rule 1.3 and 1.4 violations were also present. *See St. Hilaire, Daniel I. advs. Attorney Discipline Office* #12-034; #12-035 (February 3, 2015).

105. In light of the *ABA Standards*, the mitigating factors, and the Court and Professional Conduct Committee decisions noted above, the parties agree a reprimand is the appropriate sanction in this matter.

E. **Costs**

106. Subject to the Profession Conduct Committee's approval of this Stipulation, Mr. Grau agrees to pay the costs incurred by the ADO in the investigation and enforcement of this disciplinary matter. *See* Supreme Court Rule 37(19). The agreement to pay the costs incurred by the ADO is the subject of a separate agreement signed by Mr. Grau.

F. **Effect of Stipulation**

107. Mr. Grau understands that this stipulation represents a recommended disposition, and that the Professional Conduct Committee may accept, reject, or conditionally accept the stipulation, pursuant to Rule 37A (III)(aa).

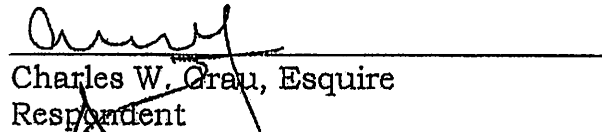
108. Mr. Grau acknowledges that the admissions of misconduct and the proposed disposition contained in this stipulation are freely, knowingly, and voluntarily submitted; that he is not entering this stipulation as a result of any threats, coercion, or duress, or of any promises or inducements not set 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.

109. Mr. Grau knowingly and intelligently waives his right to a hearing.

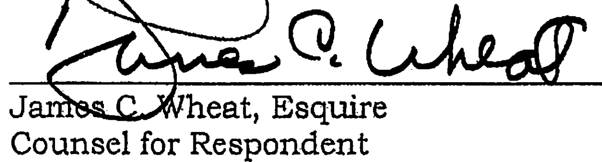
Respectfully submitted,

Dated: December 5, 2017



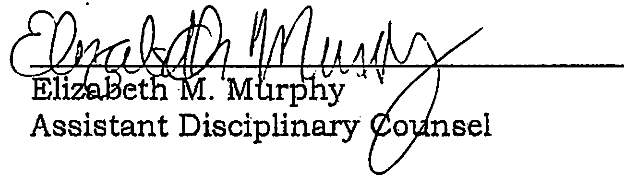
Charles W. Grau, Esquire
Respondent

Dated: 12. 6. 2017



James C. Wheat, Esquire
Counsel for Respondent

Dated: December 6 2017



Elizabeth M. Murphy
Assistant Disciplinary Counsel

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109. Mr. Grau knowingly and intelligently waives his right to a hearing.

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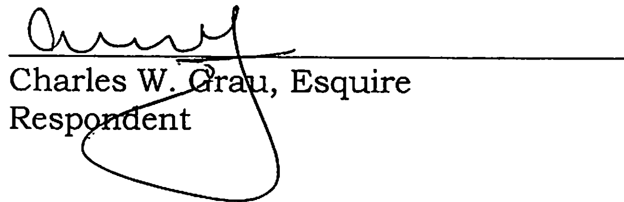
Dated: December 5, 2017

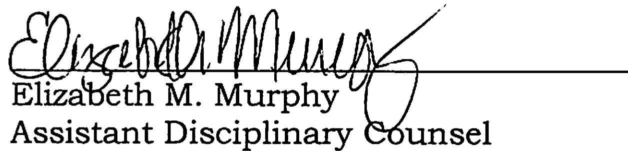


Charles W. Grau, Esquire
Respondent

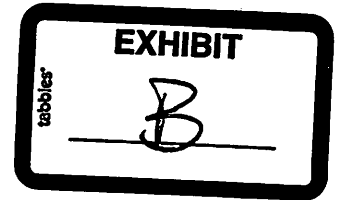
Dated: ____________ 2017

James C. Wheat, Esquire
Counsel for Respondent

Dated: December 6 2017



Elizabeth M. Murphy
Assistant Disciplinary Counsel



NEW HAMPSHIRE SUPREME COURT

HEARINGS COMMITTEE

Grau, Charles W.

advs.

Attorney Discipline Office

#13-033

AGREEMENT TO PAY COSTS OF DISCIPLINARY MATTER

1. Subject to the Professional Conduct Committee's ("Committee") approval of the Stipulation as to 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 December 4, 2017, I have been informed that the costs presently total approximately $447.75. Should further costs accrue in the disposition of this matter, the Committee will bill me for these 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.

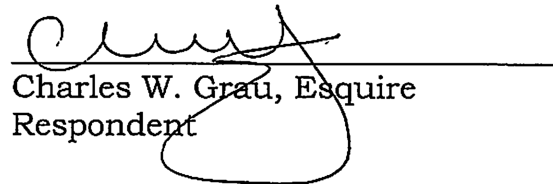
6. The Assessment shall become final unless I respond in writing, within thirty (30) days of receipt of the Committee's statement of expenses, listing each disputed expense and explaining my reasons for disagreement. Sup. Ct. R. 37(19)(b). The Committee may resolve the matter, or enforce the assessment 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: December 5, 2017



Charles W. Grau, Esquire
Respondent