

New Hampshire Supreme Court
Professional Conduct Committee
a committee of the attorney discipline system

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Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
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Nary, Donald R., II advs. Attorney Discipline Office - #16-042

REPRIMAND AND ORDER ON COSTS

On January 16, 2018, the Professional Conduct Committee (“the Committee”) deliberated the Stipulation as to Facts, Violations and Sanction: Reprimand (“the Stipulation”), and the Agreement to Pay Costs of Disciplinary Matter. Members present included David M. Rothstein, Chair; Heather E. Krans, Vice Chair; Elaine Holden, Vice Chair; Kathleen Ames; Peter G. Beeson; Margaret R. Kerouac; Caroline K. Leonard; Mona T. Movafaghi; Edward D. Philpot, Jr.; Georges J. Roy; and Martha Van Oot.

On January 18, 2018, the Committee ordered that the parties “reconsider the aggravating and mitigating factors that apply in this case and resubmit the stipulation.”

On February 20, 2018, the Committee deliberated the Resubmitted Stipulation as to Facts, Violations and Sanction: Reprimand (“the Resubmitted 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. Peter G. Beeson; Margaret R. Kerouac; and Martha Van Oot were absent.

The Committee approved the facts as stipulated by clear and convincing evidence. It further found that Donald R. Nary, II's conduct violated Rules of Professional Conduct 1.3; 1.4; 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*").

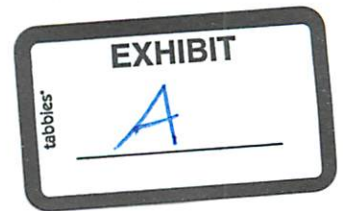
Having approved the stipulated sanction, the Committee approved the agreement that Mr. Nary shall reimburse the Committee for all costs of investigation and prosecution of this matter.

February 20, 2018



David M. Rothstein
Chair

cc: Janet F. DeVito, General Counsel
Donald R. Nary, II, Esquire
File



**NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE**

Nary, Donald R., II

advs.

Attorney Discipline Office

#16-042

**RESUBMITTED STIPULATION AS TO FACTS,
VIOLATIONS, AND SANCTION: REPRIMAND**

Donald R. Nary, II, Esq., and the Attorney Discipline Office (ADO)
stipulate as follows:

A. Facts

1. Mr. Nary is an attorney licensed to practice law in New Hampshire. Mr. Nary was admitted to practice on May 25, 2005.
2. Mr. Nary was also admitted to practice law in Massachusetts on December 16, 2004. According to the Massachusetts Board of Bar Overseers, Mr. Nary's status is listed as "Administrative Suspension for Non-Registration."
3. At all times material to this proceeding, Mr. Nary practiced law at Nary, Norris & Associates, PA, located at 56 Dover Road, P. O. Box 569, Durham, NH 03824.
4. Mr. Nary does not have a previous disciplinary history in New Hampshire.

5. This disciplinary matter was initiated by a complaint filed by Erin Penney on October 17, 2016.
6. Ms. Penney had hired Mr. Nary to process her late mother's Probate Estate (the Estate). Mr. Nary did not respond to Ms. Penney's requests for information regarding the Estate between January and October 2016.
7. When Ms. Penney inquired at the Probate Court in October 2016, she was told that there were forms that had not been timely filed and that notices had been sent to her counsel (Mr. Nary).
8. Within a short time of receiving the ADO complaint, Mr. Nary contacted Ms. Penney. Mr. Nary apologized to his client for the delay, and promptly completed the work necessary to close her mother's Estate.
9. Mr. Nary had had multiple health issues during 2016, which prevented him from being at his office on a full time basis. He made no arrangements to inform Ms. Penney of the reasons for his absence from his office.
10. Mr. Nary knew that the Estate could not be concluded until creditors had had six months to file claims against the Estate.
11. Mr. Nary failed to communicate that fact to his client, Ms. Penney.
12. Mr. Nary failed to file certain forms with the Probate Court despite having received notices from the court to do so. He filed those forms only after Ms. Penney's complaint was docketed by the ADO.
13. On January 20, 2017, Mr. Nary was offered a Diversion Plan (the Plan) pursuant to a vote by the Complaint Screening Committee (CSC). He

accepted the Plan by executing an agreement to do so on March 2, 2017.

14. The Plan required Mr. Nary to engage an office management consultant at his expense to assess his office procedures, particularly those related to client communication and case deadline management. The ADO had to approve the consultant.
15. The Plan required the consultant to report to the ADO what steps were to be taken to improve the office procedures, and within six months (by September 2, 2017) to report to the ADO if those improvements had been made.
16. Upon successful completion of the Diversion Plan, the matter would be dismissed by the CSC with a finding of no professional misconduct.
17. If Mr. Nary did not complete the Plan, he agreed that there would be a finding of professional misconduct, and that the appropriate sanction would be a reprimand.
18. Mr. Nary failed to engage an office management consultant. No report was filed with the ADO.
19. The CSC notified Mr. Nary in a letter dated September 8, 2017, that he had failed to complete the Diversion Plan, and that the matter was being referred to Disciplinary Counsel for further action.

B. Disciplinary Rules Violated

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

Rule 1.3: Diligence

21. The facts set forth at ¶¶ 1-19 above are incorporated by reference.

22. Rule 1.3 states as follows:

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

23. Mr. Nary's failure to file required forms at the Probate Court and to advance the progress of Ms. Penney's mother's Estate, from January until October 2016, violated Rule 1.3.

Rule 1.4: Communication

24. The facts set forth at ¶¶ 1-19 above are incorporated by reference.

25. 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.

26. Mr. Nary's failure to respond to Ms. Penney's reasonable requests for information regarding her case from January 2016 until October 2016,

as well as his failure to explain to her how an estate is processed, so that she understood what was happening and why there were certain time constraints, violated Rule 1.4.

Rule 8.4(a): General Rule

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

C. Recommended Sanction

28. The Attorney Discipline Office and Mr. Nary jointly agree that a reprimand 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.* (stating that "[a]fter determining the sanction, [the Court] consider[s] the effect of any aggravating or mitigating factors on the ultimate sanction").
33. Under the first prong of the analysis, Mr. Nary violated duties owed to his client to diligently complete her estate matter and to keep her informed about the progress of the case. *See Standards* Sec. II (Theoretical Framework).
34. With respect to Mr. Nary's mental state under the second prong of the sanction analysis, the parties agree that Mr. Nary's mental state was negligent.
35. The third prong of the sanction analysis requires an assessment of the actual or potential injury caused by Mr. Nary's misconduct.

36. Mr. Nary's conduct injured his client, Erin Penney, in that she was not able to close her mother's Estate in a timely manner, causing her uncertainty and anxiety. However, Mr. Nary promptly completed the work necessary to close the estate after the complaint was filed, and there was no financial harm to his client.

37. Mr. Nary's Rule 1.3 and Rule 1.4 violations implicate Section 4.4 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 a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is generally appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (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 **Admonition¹ 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.**

(emphasis added).

38. The parties agree that Mr. Nary's conduct in this matter, when considered under *Standard* 4.44, would call for a baseline sanction of reprimand.
39. The baseline sanction must be considered in light of any aggravating and mitigating factors. *E.g.*, *Conner's Case*, 158 N.H. at 303.
40. In this case there is one potential aggravating factor present, "substantial experience in the practice of law." *See Standards* § 9.22. Mr. Nary had been a practicing attorney for approximately 11 years at the time he represented Ms. Penney.
41. Courts have reached different conclusions as to how many years constitute "substantial experience." Substantial experience certainly includes a lawyer who has practiced law for decades, i.e. 20-30 years. *See, e.g., In Re Grossman*, 2000 WL 1673417 (US Tax Court Nov. 6, 2000) (30 years of practice is aggravating factor for committing civil tax fraud); *In Re Melvin*, 807 A.2d 550 (Del. 2002) (21 years experience an aggravating factor where lawyer knowingly violated a court order and destroyed documents); *In Re Rumsey*, 71 P.3d 1150 (Kan. 2003) (25 years

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.

in practice an aggravating factor where lawyer violated rules of competence, diligence, communication, fees, safeguarding property, candor towards tribunal, and termination of representation).

42. In contrast, Colorado has found six years in practice to be an aggravator. *People v. Townshend*, 933 P.2d 1327 (Colo. 1997) (lawyer took two retainers and did no work for two years, and had no mitigators). However, Colorado has also found 12 years of practice to be a mitigator. *People v. Hensley-Martin*, 795 P.2d 262, 265 (Colo. 1990) (lawyer with 12 years of experience found to be “inexperienced and naïve,” among other mitigators that reduced sanction.)
43. Mr. Nary has a general law practice. Although he had been a lawyer for 11 years at the time of his misconduct, he did not focus only on probate law; instead, it has been one part of his practice. While practicing for 11 years is more substantial than five or six years, it is not as clearly substantial as with lawyers practicing 20 or more years.
44. Mr. Nary’s years in practice could be considered as an aggravating factor. That aggravating factor, however, is outweighed by numerous mitigating factors, and thus would not change the outcome of a reprimand.
45. Mitigating factors include: 1) lack of any previous discipline; 2) the absence of a dishonest or selfish motive; 3) a timely effort to rectify the consequences of the misconduct, in that Mr. Nary promptly completed the work to close the probate case; 4) Mr. Nary’s multiple medical problems during the time in question; 5) his willingness to take

responsibility for his behavior with his client; and 6) his remorse for his actions. *See Standards* § 9.32.

46. While the mitigating factors outweigh the potential aggravating factor in this case, given the fact that Mr. Nary did not complete the diversion agreement, the parties agree that a downward departure from the baseline sanction of a reprimand is not appropriate, and that a reprimand is the appropriate sanction.
47. This sanction is proportional to discipline imposed in other cases involving breaches of Rules 1.3 and 1.4. *See, e.g., St. Hilaire, Daniel I. advs. Attorney Discipline Office, #12-034 and St. Hilaire, Daniel I. advs. Attorney Discipline Office, #12-035.* (Attorney failed to take action to enforce a judgment, failed to provide an itemized bill as requested by the clients, and failed to keep client apprised of progress in the underlying matter. Rule 1.7 was also violated. Mitigating factors outweighed aggravating factors, including substantial experience (18 years), resulting in reprimand.)

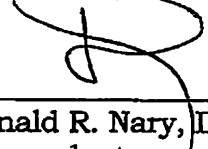
D. Costs

48. Subject to the PCC's approval of Mr. Nary's Stipulation, Mr. Nary 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. Nary.

E. Effect of Stipulation

49. Mr. Nary 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).
50. Mr. Nary 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
51. Mr. Nary has chosen not to be represented by counsel in reaching this Stipulation and acknowledges that he is fully aware of the consequences of the Stipulation.
52. Mr. Nary knowingly and intelligently waives his right to a hearing.

Respectfully submitted,



Dated: 2-9- 2018

Donald R. Nary, II, Esquire
Respondent

Dated: _____ 2018

Janet F. DeVito, Esquire
General Counsel

Dated: _____ 2018

Sara S. Greene, Esquire
Disciplinary Counsel

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Dated: _____ 2018

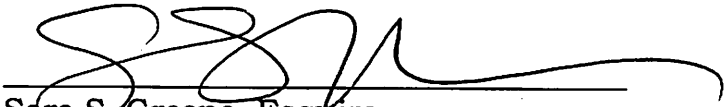
Donald R. Nary, II, Esquire
Respondent

Dated: 2-9 2018

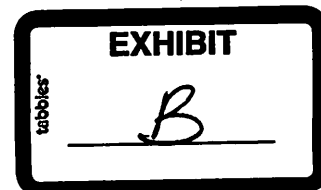


Janet F. DeVito, Esquire
General Counsel

Dated: 2/9 2018



Sara S. Greene, Esquire
Disciplinary Counsel



**NEW HAMPSHIRE SUPREME COURT
PROFESSIONAL CONDUCT COMMITTEE**

Nary, Donald R., II

advs.

Attorney Discipline Office

#16-042

**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 October 31, 2017, I have been informed that the costs are approximately zero at this time. 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: 11-21- 2017

Donald R. Nary, II, Esquire
Respondent