

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

David M. Rothstein, Chair
Heather E. Krans, Vice Chair
Elaine Holden,* Vice Chair
Ronald K. Ace*
Kathleen M. Ames*
Peter G. Beeson
Margaret R. Kerouac

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Caroline K. Leonard
Mona T. Movafaghi
Edward D. Philpot, Jr.
Georges J. Roy*
Martha Van Oot
* non attorney member
Barbara J. Guay, Legal Assistant

***Pearson, Tracy A. (f/k/a Bernson, Tracy A.) advs.
Attorney Discipline Office - #14-017***

REPRIMAND AND ORDER ON COSTS

On February 20, 2018, the Professional Conduct Committee (the “Committee”) held Oral Argument in the above matter. Present were David M. Rothstein, Chair, Heather E. Krans, Vice Chair, Elaine Holden, Vice Chair, Ronald K. Ace, Kathleen M. Ames, Caroline K. Leonard, Mona T. Movafaghi, Edward D. Philpot, Jr., and Georges J. Roy. Peter G. Beeson, Margaret R. Kerouac, and Martha Van Oot were not present and did not participate in the decision.

After the argument, the Committee deliberated the matter. Following deliberation and consideration of the entire record, the Committee voted to affirm the Hearing Panel’s finding of a violation of Rule of Professional Conduct 1.7. The Committee voted to vacate the Panel’s finding of violations of Rules 1.1 and 3.4(c). Finally, the Committee voted to impose the sanction of a

reprimand.

I. FINDINGS OF FACT

Tracy A. Pearson, Esquire, was admitted to the New Hampshire Bar in 2003. She practiced in her own law firm, Bernson Legal, PLLC, in Dover. This matter arose from a grievance filed by Daniel Enlund regarding Ms. Pearson's representation of his wife, Heather Enlund, in their divorce. The Enlunds had engaged in spouse-swapping with Robert and Jennifer Weygant, which led to the end of the married couples' relationships. The Weygants were divorced in 2012. During Attorney Pearson's representation, Mr. Weygant and Ms. Enlund lived together, and Mr. Enlund and Ms. Weygant lived together. Mr. Enlund filed this grievance during the pendency of his divorce.

While Attorney Pearson represented Ms. Enlund, she introduced Attorney Pearson to Mr. Weygant as a possible new client. Before her representation of Ms. Enlund concluded, Attorney Pearson advised Mr. Weygant on the impact of terminating Ms. Weygant's employment in his business on his child support obligation, and with respect to a post-divorce dispute with Ms. Weygant. These facts are relevant to the alleged Rule 1.7 violation.

During her representation of Ms. Enlund, Attorney Pearson lawfully acquired a copy of Mr. Enlund's financial affidavit. She later used the expense portion of the affidavit in the post-divorce action involving Robert and Jennifer Weygant. Before using the financial

affidavit in this proceeding, Attorney Pearson did not file a motion seeking permission to do so, and Mr. Enlund did not consent to its use in the Weygant post-divorce litigation. These facts are relevant to the alleged violations of Rules 1.1 and 3.4(c). As discussed further below, relevant to this analysis is Circuit Court-Family Division Rule 1.30, governing access to and use of financial affidavits. Rule 1.30 refers to RSA 458:15-b, which protects the confidentiality of financial affidavits in divorce actions.

II. ANALYSIS

Based on these facts, the Hearing Panel found that Attorney Pearson violated Rules 1.7, 1.1, and 3.4(c).

Rule of Professional Conduct 1.7(a)(2) states that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest [which] exists if [] 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. . . .” Rule 1.7(b) provides that when there is a concurrent conflict, the lawyer may undertake representation under certain circumstances, including where each client gives written informed consent.

The evidence supports the Hearing Panel’s finding of a violation of Rule 1.7 by clear and convincing evidence. Attorney Pearson’s concurrent representation of Ms. Enlund in her divorce and Mr. Weygant in his post-divorce posed a potential conflict of interest because there

were overlapping issues involving child support, alimony and child visitation, especially because Mr. Weygant and Ms. Enlund lived in the same household and their finances were intertwined. These circumstances presented a significant risk that Ms. Pearson's representation of each client would be materially limited by her representation of the other. While Attorney Pearson and the expert witnesses who testified below disagreed on whether obtaining consent was practicable, no effort was made to get consent, and none of the circumstances permitting concurrent representation enumerated in Rule 1.7(b) apply. Accordingly, the Committee affirms the Hearing Panel's finding that Attorney Pearson violated Rule 1.7. Based on that violation, Attorney Pearson also violated Rule 8.4(a) (stating that it is professional misconduct to violate the Rules of Professional Conduct).

Turning to the analysis of the alleged violations of Rules 1.1 and 3.4(c), Rule 1.1 governs a lawyer's duty to provide competent representation. Rule 3.4(c), governing fairness to the opposing party and counsel, states that an attorney shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. . . ." The Hearing Panel found that Attorney Pearson's use of the financial affidavit violated Circuit Court-Family Division Rule 1.30, which renders such affidavits confidential; that rule refers to RSA 458:15-b, which further protects the affidavits from disclosure. The Hearing Panel found that when Attorney

Pearson used the affidavit she had lawfully acquired during the Enlund divorce in the Weygant post-divorce, she (1) knowingly violated the court rule, and thus (2) violated her duty of competence under Rule 1.1, and (3) violated her duties of fairness under Rule 3.4(c).

The Committee disagrees. While Attorney Pearson's conduct may have implicated RSA 458:15-b, no such violation was alleged or argued below. Her conduct did not violate Rule 1.30. Attorney Pearson lawfully acquired the affidavit, that is, she was "otherwise entitled to access" the affidavit due to her representation of Ms. Enlund. Though she could have proceeded differently, the Committee did not find, by clear and convincing evidence, that her decision to use the financial affidavit in the Weygant post-divorce action violated the court rule. Because she did not clearly violate Circuit Court-Family Division Rule 1.30, Attorney Pearson did not violate Rules of Professional Conduct 1.1 or 3.4(c).

III. SANCTION

Having found a violation of Rule 1.7, the Committee considered the issue of sanction. Both case law and the American Bar Association's *Standards for Imposing Lawyer Sanctions* (2005) ("*Standards*") support the sanction of a Reprimand.

The purpose of the Court's disciplinary power is "protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future." *Conner's Case*, 158 N.H. 299, 303 (2009). "The sanction . . . must take into account the severity of

the misconduct.” *Coffey’s Case*, 152 N.H. 503, 513 (2005).

Although the Court has not adopted the *Standards*, it looks to them for guidance. *Conner’s Case*, 158 N.H. at 303. The *Standards* set forth a four-part analysis to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” *Id.* (quoting *Douglas’ Case*, 156 N.H. 613, 621 (2007)); *Standards* § 3.0.

The first three parts of the analysis create the framework for characterizing the misconduct and determining a baseline sanction. *Conner’s Case*, 158 N.H. at 303. Once the baseline sanction is determined, the Court then looks to the fourth and final part of the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.*

The Committee adopted the Hearing Panel’s finding that Attorney Pearson acted negligently in violating Rule 1.7. It agreed that her actions, while carrying the potential for harm, caused no actual harm to either client. The Committee agreed that apart from Attorney Pearson’s ten years of experience, no other aggravating factors existed. Mitigating factors included her lack of prior disciplinary record, her good character and reputation, her cooperation with the Attorney Discipline Office in its investigation, the lack of harm to her clients, and the lack of any dishonest or selfish motive. The Hearing Panel imposed a reprimand based on the violations of Rules 1.1 and 1.7, and a public censure for the violation of Rule 3.4(c). Given that the Committee did not find that Attorney Pearson violated Rules 1.1 or 3.4(c), a

reprimand is appropriate.


IV. COSTS

Because the Committee found professional misconduct on one of the two factual scenarios alleged, that is, the conflict under Rule 1.7, but not the violations associated with Circuit Court-Family Division Rule 1.30, Attorney Pearson is responsible for paying for half of all costs associated with the investigation and prosecution of this matter.

V. CONCLUSION

For all of the above reasons, the Committee imposes a Reprimand for Attorney Pearson's violations of Rules of Professional Conduct 1.7 and 8.4(a), and vacates the findings of professional misconduct and sanctions associated with the alleged violations of Rules 1.1 and 3.4(c).

April 30, 2018



David M. Rothstein
Chair

cc: Elizabeth M. Murphy, Assistant Disciplinary Counsel
Richard C. Nelson, Esquire
File