New Hampshire Supreme Court

Professional Conduct Committee

a committee of the attorney discipline system

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In the Matter of Patrick B. Shanley - LD-2011-0011

RECOMMENDATION FOR A SIX MONTH SUSPENSION WITH THREE MONTHS STAYED FOR ONE YEAR

On April 17, 2012, the Professional Conduct Committee heard oral argument on the above matter which comes to us on the issue of reciprocal discipline from the Commonwealth of Massachusetts. The following members were present: Margaret H. Nelson, Chair; Benette Pizzimenti, Vice Chair; Toni M. Gray, Vice Chair; Thomas P. Connair; Susan R. Chollet; David N. Cole; Alan J. Cronheim; Gerald A. Daley; Richard H. Darling; James R. Martin, and Richard D. Sager. Jaye L. Rancourt was absent. The Attorney Discipline Office ("ADO") was represented by Julie A. Introcaso, Disciplinary Counsel. Patrick B. Shanley, Esquire, appeared on his own behalf.

I. BACKGROUND

Mr. Shanley was found by the Massachusetts Board of Bar Overseers ("the Board") to have violated Rules 8.4(c) and 8.4(h) of the Massachusetts Rules of Professional Conduct. Rule 8.4(c) is identical to New Hampshire Rule 8.4(c) of the Rules of Professional Conduct and Rule 8.4(h) does not have a precise counterpart in the New Hampshire Rules, but states:

> It is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on his or her fitness to practice law.

Mr. Shanley was admitted to practice law in Massachusetts and New Hampshire in 1999. On August 19, 2010, the Office of Bar Counsel filed a petition for discipline alleging that Mr.

Shanley altered a letter signed and sent to him by Bar Counsel regarding a disciplinary matter pending against Mr. King, another Massachusetts' lawyer, and a competitor of Mr. Shanley. Bar Counsel's original letter inquired about Mr. Shanley's availability to testify in the King matter. Mr. Shanley altered the letter by redacting his name and address. He then distributed copies of the letter to nine others, making it appear that they were being asked to give testimony in the King disciplinary matter.

A full evidentiary hearing on the Shanley petition was held on December 1, and December 3, 2010, and a hearing committee found that Mr. Shanley had violated Rules 8.4(c) and (h) of the Massachusetts Rules of Professional Conduct. The Board issued a Public Reprimand, equivalent to a Public Censure in New Hampshire. On November 18, 2011, the ADO filed a certified copy of the Board's Order with the New Hampshire Supreme Court pursuant to Supreme Court Rule 37(12)(a). On December 13, 2011, this Committee deliberated the issue of reciprocal discipline and notified the Court of its belief that:

> [T]he imposition of discipline identical or substantially similar to that imposed by [the Board] would be unwarranted. In light of the factual findings and rule violations found by the [Board], and based on the prior decisions of the Court and the Committee . . . this matter would warrant substantially more serious discipline in New Hampshire.

Thereafter, the Court remanded the matter for a hearing on the issue of sanction. The matter came to the Committee following that hearing.

II. FACTS FOUND BY THE MASSACHUSETTS BOARD

1. The respondent, Patrick B. Shanley, was admitted to the Massachusetts bar on June 15, 1999. Since his admission, he has been in private practice. He has had an office in Lowell for seven years and has four associates who work for him. Among other types of cases, his office handles personal injury matters.

2. John J. King was admitted to the Massachusetts bar on June 18, 1998. He was suspended from the practice on November 6, 2007 and was reinstated on February 19, 2008. King has practiced personal injury law, among other cases, in Lowell. The respondent first heard of him in 2001. Starting in 2005, the respondent and King have had professional disputes about cases, which have included some disputes over dividing fees in personal injury cases where the respondent was discharged and King took over the case. They also had disputes where the respondent took over a case from King and King would not turn over the file.

3. One of the cases in which a dispute arose involved a client named Sambath Chann. The respondent was retained in May 2005 to represent Chann in a personal injury case on a contingent fee basis. The respondent filed suit on Chann's behalf. Sometime prior to the fall of 2006, the respondent was discharged and King took over the matter. The respondent filed an attorney's lien after his discharge.

4. At some point thereafter, the respondent learned that the case had been settled by King for $7,500. The respondent also learned that a settlement check had been issued to King listing the respondent as payee along with King and the client. Furthermore, the respondent was informed that the check had been negotiated without his signature and without his knowledge or authorization.

5. The respondent reported this conduct to bar counsel in or about October 2007.

6. By August 2008, the respondent had been paid by the bank the amount due to him in the Chann matter.

7. Another case which led to a dispute with King involved a client named Said Labibi. This was also a personal injury case handled by the respondent on a contingent fee basis. The respondent was retained in 2005, was subsequently discharged, and the case was taken over by King.

8. At some point after his discharge, the respondent formed a belief that King had settled the case, collected the proceeds, and failed to pay a fee to the respondent. Consequently, in May 2007, the respondent filed a small claims action against King. Because the respondent had not filed suit in this matter, he did not have an attorney's lien. King defaulted in the small claims action and the respondent got a default judgment in June 2007 for $2,000. In the fall 2007, the court scheduled a payment review and the respondent appeared, but King did not.

9. In November 2007, the respondent alleged to bar counsel that King intentionally and without good cause had failed to appear in the small claims action brought by the respondent.

10. In the fall of 2008, King moved to remove the *capias*, vacate the default, and dismiss the case. At about that time, the respondent learned that King had never actually settled the Labibi case and that King had been replaced by a third lawyer who had settled the case and distributed the proceeds.

11. At the disciplinary hearing, the respondent admitted that, although he had a default judgment against King, who had failed to show up for the payment review, King did not in fact owe an underlying debt to the respondent. Nonetheless, the respondent pursued his efforts to collect that judgment.

12. In the meantime, King sued the respondent in superior court for fraud as a way of collaterally attacking the small claims judgment. The respondent defended and got the superior court action dismissed.

13. In early 2009, the respondent moved to enforce the judgment in small claims court and that motion was denied. In August 2009, after various motions and a trial by a magistrate, judgment [was] entered for King in the small claims case.

14. In 2009, bar counsel filed a petition for discipline against King, consisting of five counts, of which counts three and four involved allegations stemming from the two disputes as set forth above between the respondent and King. Based on that petition, Assistant Bar Counsel Gilmore, who was handing the King matter, planned to call the respondent as a witness on those counts.

15. On or about August 5, 2009, Gilmore sent the respondent a letter in which she informed him, among other items, that she had filed a petition for discipline against King, that hearings on the petition were scheduled for several days in October 2009, and that she wanted to call the respondent as a witness in the proceedings against King. In the letter, Gilmore listed the scheduled hearing dates, asked the respondent to inform her within the next week of his availability on those dates and later dates if the hearings were not then concluded, and encouraged the respondent to contact her with any questions or concerns.

16. The respondent received Gilmore's letter on or about August 6, 2009. That day, he called Gilmore and left her a voice mail indicating he was available on three of the hearing dates.

17. Within a few days after receiving Gilmore's letter, the respondent admits that he altered a copy of the letter by deleting his name, his address, and the salutation with his name.

18. On or before August 10, 2009, the respondent personally delivered copies of the altered letter and BBO website printout of Attorney King[1] to chiropractors in the Lowell area that he did business with. He delivered the letters at a time when the chiropractors were not in their offices and mail would not be delivered. He either folded the letters and printout in half and put them on a door handle or slid them under a door or through a mail slot. At the disciplinary hearing, the respondent testified that he could not recall how many he delivered or to whom he delivered the altered letter, but admitted that, at the time he was doing business with the following chiropractors in the Lowell area: Dr. John Broderick, Dr. Raul Velez, the Chiropractic Care Center, Dr. Roberta Jaeger of Helping Hands Family Chiropractic, and Dr. Lawrence Gray of Mill City Chiropractic.

19. The respondent did not include a cover note or provide any indication that he was the source of the delivery or that Gilmore was not the source of the delivery. The respondent did not have any subsequent conversations with any of the recipients of the altered letter and printout to explain that he had delivered them. Indeed, the respondent intentionally concealed that he was the source of the deliveries.

20. On August 10, 2009, Gilmore received a voice mail message from an individual purporting to be Dr. John Broderick stating he had received a letter signed by Gilmore concerning the King disciplinary hearing. The message also stated that the documents this person received were being faxed to Gilmore. That same day, Gilmore received a two-page fax from a person purporting to be Dr. Broderick. It was identical to the letter the respondent admits he altered and delivered and attached to it was the Board's website page concerning King.

21. That same day, Gilmore received telephone calls from people identifying themselves as Dr. Raul Velez, Rhonda from Chiropractic Care Centers of Lowell, and an attorney named Eric Schutzbank calling on behalf of Dr. Roberta Jaeger at Helping Hands Chiropractic. In each case, Gilmore asked them to fax her exactly what they had received, and received from them a copy of Exhibit 2, the altered letter, with the website printout concerning King.

22. Gilmore then compared the signature on the altered letter with her signature on the witness letters she had sent out in the King matter and

[1] The printout was taken from the Board's website and stated King's office address, his date of admission to the bar, his status the dates of his suspension and reinstatement, and the fact that disciplinary proceedings were pending.

determined that her signature on the altered letter matched that on the copy addressed to the respondent.

23. The next day, Gilmore received a call from a person who identified himself as a chiropractor named Lawrence Gray, who faxed to her the letter and website printout he had received.

24. Gilmore called the respondent and told him she had received calls and faxes from individuals who said they were chiropractors in the Lowell area and they had received a letter that appeared to be from Gilmore and the Office of Bar Counsel, notifying them of the King hearing dates. She asked the respondent if he had delivered the letters and he confirmed that he had.

25. The next day King's counsel in his disciplinary case informed bar counsel that King was aware of the distribution of the altered letter, and King then filed a motion requesting the identity of the person who distributed the altered letter and a deposition of that person. That motion was denied; however, bar counsel subsequently dismissed counts three and four of the petition for discipline against King – these were the counts involving the disputes between the respondent and King – due to proof problems, namely issues of bias, bad faith, and wrongful motive on the part of the respondent.

26. We find that the altered letter, as delivered by the respondent, was intentionally false, deceptive, and misleading. The altered letter made it appear to the recipients that Gilmore had sent or delivered it to them and was asking them to appear and testify in the King disciplinary case or at least call Gilmore and ask about the letters and the King matter.

(Citations omitted.) The Board adopted the Hearing Panel's Findings and Conclusions of Law. Board Memo, at 6 (October 17, 2011).

III. MR. SHANLEY'S MOTIONS BEFORE THE PROFESSIONAL CONDUCT COMMITTEE

Mr. Shanley filed a Motion to Strike and a Motion to Dismiss. Mr. Shanley argued that all reference to the Massachusetts' decision and facts should be stricken and the matter dismissed because Massachusetts uses a preponderance of the evidence standard. In contrast, in New Hampshire disciplinary matters, New Hampshire Court Rules require a higher clear and convincing evidence standard.

Disciplinary counsel filed an Objection to the Motions arguing, *inter alia*, that New Hampshire Supreme Court Rule 8.5(b)(2) states:

> (b)*Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (c)
>
> . . .
>
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred . . . .

Disciplinary Counsel cited several cases for the proposition that states use of the preponderance of the evidence standard does not constitute a deprivation of due process if the facts established are used in a subsequent reciprocal disciplinary matter in a jurisdiction using the clear and convincing standard. *See, In re Donal B. Barrett*, 966 A. 2d 862 (D.C. 2009).

At the hearing on this matter, Mr. Shanley was asked by a member of the Committee:

> The Massachusetts report included 26 findings of fact. You were laying (sic[raising]) a question about preponderance versus a clear and convincing standard which are legal conclusions, but are there any of those 26 findings of fact which you dispute, and if so, which ones? Because they seem to be just a recounting of the circumstances of what occurred.. . .
>
> I'm just wondering if there are any factual findings in the Massachusetts report which you dispute, because as I read them, it seemed as if you likely agreed with all 26 of those findings of fact.
>
> Mr. Shanley: I'm not here to quibble about the factual findings. That's not why I'm here. I accepted responsibility. I had an appeal going. I hired an attorney to file the appeal, and I withdrew it to move on from this. I like the practice of law. I like the practice of law in New Hampshire. I'm not here to fight about these facts. That's not why I'm here. I'm here about the sanction of how much I should get.

Transcript (4/17/12) pp. 16-18.

Based on the law, the authorities cited, and Mr. Shanley's choice not to challenge any of the factual findings made by the Massachusetts Board, the Committee voted to deny Mr. Shanley's Motion to Strike and Motion to Dismiss.

IV. SANCTION

Mr. Shanley engaged in intentional acts of deceit in altering the letter he had received from Bar Counsel and then passing them off as if they had been directed to others. The Board found that the altered letter was intentionally false, deceptive, and misleading.

Board Memo, Attachment A p. 8.

We look to the American Bar Association's *Standards for Imposing Lawyer Sanctions* (1992) ("*Standards*") for guidance in determining the appropriate sanction.

The *Standards* set forth a four part analysis for courts to consider in imposing sanctions for any act of attorney misconduct: "(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." (quoting *Douglas' Case*, 155 N.H. 613, 621 (2007)); *Standards* § 3.0.

The first three steps create the framework for characterizing the misconduct and determining a baseline sanction. *Conner's Case* at 303. Once the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Id.* (citing *Wolterbeek's Case*, 152 N.H. 710, 714 (2005)).

Under the first prong of the analysis, the Mr. Shanley's misconduct violated his duty to the profession when he failed to maintain the integrity of the profession. Mr. Shanley also violated his duty to the general public when he failed to exhibit the highest standard of honesty and integrity, and engaged in conduct involving dishonesty, fraud, or interference with the

administration of justice. *See Standards* II - *Theoretical Framework.*

"What is relevant to the second [prong] is the volitional nature of the respondent's acts..." *Grew's Case* at 366. The facts of this case, as found by the Board, support the conclusion that the Mr. Shanley acted intentionally with respect to altering Bar Counsel's letter and distributing it under false pretenses.

Board Memo, Attachment A p. 8.

The third prong requires consideration of the actual or potential injury caused by the attorney's misconduct. *See Kersey's Case*, 150 N.H. 585 (2004), (citing *Standards* §3.0). Acts of dishonesty, fraud, or deceit by attorneys cause the public to lose confidence in lawyers and the judicial system as a whole. Here, the Mr. Shanley clearly caused injury to the reputation and integrity of the legal profession when he engaged in conduct involving deceit.

In addition, Bar Counsel felt compelled to seek dismissal of two of the counts pending against Mr. King because they arose from disputes with the Mr. Shanley who could no longer be relied upon to give credible testimony. *Contra* Board Memo, Attachment A. at p. 2.[2]

The following section of the *Standards* is relevant to determining the appropriate baseline sanction in the instant case:

> 5.1 *Failure To Maintain Personal Integrity*
>
> 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 commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> 5.11 Disbarment is generally appropriate when:

[2] The hearing committee determined that "dismissal of the two counts against King did not constitute harm because it was a discretionary action on bar counsel's part and because it was conceivable that the same decision might well have resulted from the respondent's legitimate publication of information about the King hearing." Attachment A p. 2.

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand[3] is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition[4] is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Section 5.11(b) appears to be the most applicable standard and calls for a baseline sanction of disbarment. However, in analyzing New Hampshire cases such as: *In the Matter of Mary Notaris*, LD-2010-008 (2010), *Bosse's Case*, 155 N.H. 128 (2007), *Grew's Case*, 156 N.H. 361 (2007), *Gosling, Tamblyn F.*, 07-035 (2009), and *Desmarais-Gordon, Christine*, 00-N-125 (2005), the Committee balances the duty to protect the public with the harm caused by Mr. Shanley's deceit. Mr. Shanley stated that approximately 30 percent of his practice is in New Hampshire. Transcript, 4/17/12 p. 20, l. 4. Thus New Hampshire has a significant interest in this matter and protecting the citizens of New Hampshire. This appears to be an isolated act of deceit, but one which caused harm to the legal profession, as does any act of deceit by an attorney. In

[3] Section 5.13 uses the term "Reprimand." The most analogous sanction in New Hampshire is Public Censure.

[4] Section 5.14 uses the term "Admonition." The most analogous sanction in New Hampshire is a Reprimand.

addition, Bar Counsel dismissed two of the counts against Mr. King because Mr. Shanley could not be relied upon to give credible testimony. In view of all the facts, the law and the circumstances, we therefore, recommend a downward deviation to suspension as the appropriate sanction.

After the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: the existence of any aggravating or mitigating factors and whether they affect the baseline sanction. *Wolterbeek's Case*, at 714.

There are several factors to consider in aggravation. *Standards* § 9.2. Mr. Shanley's intentional acts of deceit were intended to create concern in the minds of the letters' recipients, and ultimately harm the reputation of another attorney, one with whom was often competed for clients. His selfish and dishonest motive must be considered. *Standards* § 9.22(b). If he were only attempting to educate possible clients about the alleged misdeeds of another attorney, he could have accomplished that goal by honest, legitimate means.

Mr. Shanley's misconduct cannot be characterized as wholly unrelated to the practice of law. His conduct involved a rivalry with another lawyer, made misrepresentations to potential clients and occurred within a quasi-judicial proceeding. The interference with the orderly prosecution of the King matter should be considered an aggravating factor. *See generally* § 9.22(f).

Mr. Shanley demonstrated a lack of awareness and understanding of the significance of his wrongdoing as noted by the hearing committee below. With respect to the alteration and distribution of Bar Counsel's letter, his "unwillingness or inability to come to grips with the wrongfulness of his conduct" was considered in aggravation. Board Memo, Attachment A, at 4 (citing *Matter of Clooney*, 403 Mass. 654 at 657 (1988); *see also* Disciplinary Counsel's

Memorandum on Sanction, *Desmarais-Gordon at 10.* (. . . [Respondent] lacked any internal ethical compass with regard to her misconduct, even after her acts of deceit . . . had been brought to the attention of the Court.); *Standards* § 9.22(g).

The Massachusetts hearing committee also found that the Mr. Shanley's testimony at the hearing lacked candor, Board Memo, Attachment B, at 9, "which 'must' be weighed in aggravation." Board Memo, Attachment A, at 5 (citing *Matter of Eisenhauer*, 426 Mass. 448 (1998); *Matter of Friedman*, 7 Mass. Att'y Disc. R. 100,103 (1991)). *See generally* § 9.22(f).

Mr. Shanley's "long standing as an attorney" is the final aggravating factor to be considered. As stated in the Board's Order, "an experienced lawyer should know better." Board Memo, Attachment A, at 4 (citing *Matter of Luongo*, 416 Mass. 308 (1993). It is also noteworthy that Mr. Shanley acts as a supervising attorney in his own firm. *Standards* § 9.22(g).

To fairly determine the appropriate sanction in this case, the Committee considered "the mitigating circumstances disclosed by the record." *Basbanes' Case*, 141 N.H. at 6. *See also Standards* § 9.3.

Mr. Shanley has practiced law since 1999 and has no prior disciplinary record in New Hampshire or Massachusetts. *Standards* § 9.32(a); *see also O'Meara's Case*, 150 N.H. 157 (2003) (demonstrating that the lack of a disciplinary record can be a mitigating factor in a deceit case).

After Bar Counsel's inquiry in the King matter shifted focus to the possible misdeeds of Mr. Shanley, he was forthcoming. Additionally, the hearing committee found that Mr. Shanley never denied that he had altered, copied, and delivered the letters. *Standards* § 9.32(e).

Although worthy of recognition, his lack of a prior disciplinary record and his truthful admission should be afforded only minimal consideration and weight, as an attorney has a

professional obligation to be truthful and an obligation to cooperate with disciplinary authorities. *See Feld's Case*, at 29.

In view of the seriousness of Mr. Shanley's conduct, the Committee recommends that Mr. Shanley be suspended from the practice of law for a period of six months, with three months stayed for a period of one year.

VI. COSTS

The Respondent shall pay all costs of the investigation and prosecution of this matter.

VII. CONCLUSION

Mr. Shanley's Motion to Strike and Motion to Dismiss are DENIED.

For the above reasons, the Committee recommends that Mr. Shanley be suspended from the practice of law for six months with three months stayed for a period of one year as reciprocal discipline for violating the Massachusetts Rules of Professional Conduct.

May 22, 2012

Margaret H. Nelson
Chair

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