

New Hampshire Supreme Court
Professional Conduct Committee

a committee of the attorney discipline system

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Richey, Danielle L. advs. Attorney Discipline Office - #17-025

REPRIMAND AND ORDER ON COSTS


On July 16, 2019, the Professional Conduct Committee ("the Committee") deliberated the attached Hearing Panel Report.

The Committee approved the facts by clear and convincing evidence. It further found that Danielle L. Richey's conduct violated Rules of Professional Conduct 1.6; 1.15; and 8.4(a), as found by the Hearing Panel.

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 sanction, the Committee approved the agreement that Danielle L. Richey shall reimburse the Committee for all costs of investigation and prosecution of this matter.

July 18, 2019



David M. Rothstein
Chair

cc: Brian R. Moushegian, General Counsel
Elizabeth M. Murphy, Assistant Disciplinary Counsel
William C. Saturley, Esquire
File

NEW HAMPSHIRE SUPREME COURT

HEARINGS COMMITTEE

No. 17-025

Danielle L. Richey (formerly Danielle L. Santuccio)

advs.

Attorney Discipline Office

HEARINGS COMMITTEE REPORT

The following report is submitted by a panel of the Hearings Committee (the “Committee”)¹ to which this matter was referred pursuant to Supreme Court Rule 37 A.

The Committee heard evidence on May 9, 2019. Based on an agreed “Stipulation as to Facts and Rule Violations” entered into between Ms. Richey and Bar Disciplinary Counsel Brian Moushegian in January 2019 (the “Stipulation”), the hearing related solely to the issue of the appropriate sanction or sanctions to be assessed.² During the Hearing, the Committee heard testimony from two witnesses: the Complainant, David Caputo, a Certified Public Accountant and a partner in the accounting firm of Gamwell, Caputo, Kelsch & Co., P.L.L.C. (“GCK”), and Ms. Richey. Ms. Richey was represented at the Hearing by William Saturley of Preti, Flaherty, Beliveau & Pachios.

¹ The Committee consisted of the following members: Barbara Keshen, Chair, Wilbur A. Glahn, III, Reporter, Jason R. L. Major, and Public Members Richard Darling and Patricia Clogher Sherman.

² A copy of the Stipulation is attached to this Report. Certain of the stipulated facts are also set forth herein.

Issue Presented

The Rules of Professional Conduct that were stipulated to have been violated involved potential violations of client confidentiality and the safekeeping of client property. The violations were based on Ms. Richey's delay in removing—or failure to remove—client files belonging to a law firm in which she was a partner from the basement of a building owned by GCK at 481 White Mountain Highway in Conway, New Hampshire (the "Property"). The proceedings that resulted in the hearing began in August 2017, when Mr. Caputo filed a grievance letter against Ms. Richey.³ Stipulation ¶¶ 5, 26. While the grievance letter was not admitted in evidence, it is plain from the Stipulation and the hearing testimony that Mr. Caputo complained about the failure to remove the records or the delay in doing so. *Id.* ¶ 6.⁴ Mr. Caputo testified at the Hearing that he filed the grievance after his administrative assistant had attempted to contact Ms. Richey but was unable to obtain an answer as to when the files would be removed. Hearing Transcript ("Tr.") at 28-29. More specifically, he testified that his assistant first contacted the New Hampshire Bar Association, which recommended contacting the Attorney General's Office, which in turn suggested contacting the Attorney Discipline Office. *Id.* ¶¶ 29, 51.

The Stipulation concedes that Ms. Richey's actions violated three Rules of Professional Conduct, namely, Rule 1.6 entitled "Confidentiality of Information," Rule 1.15 entitled "Safekeeping Property," and Rule 8.4 entitled "Misconduct," which provides that it is

³ The letter was not marked as an exhibit at the Hearing.

⁴ The course of this matter between the time the grievance letter was filed in August of 2017 and the May 2019 hearing is complicated. Stipulation ¶¶ 28-32, 35-36. In October 2017, the ADO filed a Petition for Immediate Interim Suspension for failure to remove client files from the basement of the Property. The Supreme Court requested a report on progress of the removal, and eventually denied the ADO's Petition. The Hearing resulted from the failure of Ms. Richey to remove all of the files by November 2018. These interim procedural steps were largely irrelevant to the Committee's consideration of this matter.

“professional misconduct to violate, or attempt to violate, the Rules of Professional Conduct.”

Stipulation ¶¶ 53, 56 and 57.

In relevant part, Rule 1.6 states as follows:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).⁵

Rule 1.15 (a) provides as follows:

A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property, in accordance with the provisions of the New Hampshire Supreme Court Rules. The lawyer shall maintain the minimum financial records with respect to the client and third party funds as may be required by the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules. Sufficient records of all other property of clients or third persons shall be kept by the lawyer and shall be preserved for a period of six years after final distribution of such other property or any portion thereof. All client and third party property shall be identified as such and appropriately safeguarded.

As Ms. Richey agreed that these Rules had been violated by virtue of her failure to remove client files from the Property, the sole issue for consideration by the Committee was the appropriate sanction.

Background to the Violations

Ms. Richey was admitted to practice law in New Hampshire in October 2006.

Stipulation. ¶ 1. She is not admitted to practice in any other jurisdiction. *Id.* ¶ 2. In 2011, Ms. Richey was hired by the law firm of Melendy & Lee, P.A., which had offices in a portion of the Property, including basement space in which it stored client files. *Id.* ¶ 6; Tr. 22-24. When Ms. Richey joined the firm, Melendy & Lee amended its Articles of Incorporation and changed the

⁵ There was no claim that disclosure of client files in this matter—if any—was permitted by paragraph (b).

firm name to Melendy, Lee and Santuccio (“MLS”) (Santuccio was Ms. Richey’s name prior to her divorce in 2016). *Id.* ¶ 7. Ms. Richey then became a partner in MLS. *Id.* ¶ 9.

Approximately eight months after Ms. Richey joined MLS, Ms. Melendy and Ms. Lee retired from the practice of law, leaving all of the firm’s client files at the Property. *Id.* ¶¶ 8-9. At that point, Ms. Richey became the sole owner of MLS. *Id.* The “vast majority” of the files of MLS left at the Property predated Ms. Richey’s association with the MLS firm, and were “closed” files. *Id.* Most of the files, together with old computers and office files, were stored in the basement of the Property. *Id.*

In October 2015, the accounting firm of GCK purchased the Property. *Id.* ¶ 10. During the negotiations between her landlord and GCK to purchase the Property, Ms. Richey was unaware the Property was to be sold, and unaware she was going to be asked to leave the Property prior to the expiration of her lease, which was to expire in May 2016. *Id.* ¶ 11. Although she continued to practice law at the Property and under the firm name MLS, once the Property was sold, Ms. Richey was tasked with finding a new office rental. *Id.*

In November of 2015—and prior to the expiration of the MLS lease on the Property—Ms. Richey relocated MLS from the Property to 102 Seavey Street in North Conway, New Hampshire. *Id.* ¶ 12. One condition of her vacating the Property prior to the expiration of the lease was that she be allowed to store the MLS files at the Property. *Id.* ¶ 13.⁶ The files, which were maintained in several rows of file cabinets, and included several outmoded and unusable

⁶ Mr. Caputo agreed that Ms. Richey accommodated GCK by moving prior to the expiration of the MLS lease. Tr. 38.

computers and pieces of office equipment, were located in the Property's basement, and were maintained in a room separate from GCK's activities. *Id.*⁷

Mr. Caputo knew Ms. Richey at the time GCK purchased the Property in 2015. Tr. 23. When the Property was purchased, he understood that Ms. Richey had no place to store the files, and GCK agreed to allow her to keep the files in the basement of the Property. Stipulation ¶ 14; Tr. 24-25. There was no formal contract between Ms. Richey and GCK (or MLS and GCK) regarding the storage of the MLS files, but Mr. Caputo testified that he agreed that Ms. Richey could keep the files in the basement "until she found storage space." Stipulation ¶ 15; Tr. 25, 39. Mr. Caputo did not believe that the arrangement was that the MLS files could remain on the Property indefinitely, nor did he think that the arrangement would last three years, but he "gave her no time stipulations whatsoever." Tr. 25, 39.⁸

Although there was no formal lease for the use of the basement space, the MLS files were maintained in a locked space to which no one other than Ms. Richey and GCK had access. Tr. 4-41. The parties agreed to a system under which, if a client of Ms. Richey's (generally, a client of the former partners and of MLS) needed access to a file, one of Ms. Richey's staff persons would go to the Property during working hours to retrieve the file. Mr. Caputo and GCK would obtain verbal permission from Ms. Richey prior to permitting the staff person into the file room. The file would then be brought to Ms. Richey's office for the client to pick up. Stipulation ¶ 16.

⁷ Ms. Richey testified that there were approximately 10,000 files, most of which were real estate closing files. Tr. 55. She also testified that the files were organized by a closing number with an index that she maintained so that the files could be accessed when needed. Tr. 59.

⁸ Mr. Caputo testified that because the MLS files were stored in the basement of the Property, it was necessary for GCK to store its files elsewhere as he did not want to commingle the files. Tr. 26.

In the summer and fall of 2016, GCK requested that Ms. Richey remove the MLS files from the Property. Ms. Richey was unable to comply at that time. *Id.* ¶ 17. On December 15, 2016, at GCK’s request, Ms. Richey executed a General Liability Release of Claims (the “Release”), whereby she released GCK “from any and all claims, demands, damages, actions, causes of action or suits arising out of or in any way relating to the storage of said items...[i.e., the files]” should they be destroyed by fire, flood, hurricane or other acts out of GCK’s control. At the time that Ms. Richey executed the Release, she advised GCK that she would continue to look for new storage space for the files. *Id.* ¶ 18. Mr. Caputo testified that he requested the release because of concerns over GCK’s potential liability for the MLS files in the event of water or fire damage. Tr. 41.

As set out in the Stipulation and in testimony at the hearing, from early 2017 through August of 2017, representatives of GCK communicated—or attempted to communicate—with Ms. Richey in an effort to have the MLS files removed from the Property. Stipulation ¶¶ 20-28. When GCK did not receive a response from correspondence to Ms. Richey requesting the removal of the files, Mr. Caputo filed the grievance. *Id.* ¶¶ 25-27.

Ms. Richey did not dispute that she had not responded to the communications in the summer of 2017. Tr. 82-83. During 2016 and 2017 she experienced a number of difficult circumstances in her personal and professional life. Tr. 61. Her husband left her in early 2016, and she experienced a difficult divorce. *Id.* She was caring for her mother, who lived in Jaffrey, New Hampshire, and was required to travel to Jaffrey to assist her. *Id.* 62-63. In January 2017, two weeks after her sister gave birth, her sister’s fiancé committed suicide, and Ms. Richey was responsible for caring for her sister. *Id.* 63-64; 101. Also in 2017, Ms. Richey’s new law firm failed due to conflicts between two of the partners. *Id.* 64-65. She testified that as a result of

these circumstances, she had no place to relocate the MLS files and could not afford to do so.

Id. 67.

In addition to these issues, in January 2016, Ms. Richey received a Public Censure with Mandatory Conditions from the Professional Conduct Committee as a result of the mishandling of a matter from approximately 2009-2012. Exhibit 1 at Hearing; Tr. 86-88. And on August 8, 2016, in a separate matter, Ms. Richey was suspended from the practice of law for six months, with the suspension stayed for one year with mandatory conditions. That matter involved Ms. Richey's failure to act with diligence in representation of a client. Exhibit 2; Tr. 86-88.

Following the filing of the grievance in August 2017, Ms. Richey responded to the complaint and arranged to go to the Property on weekends to remove files. Stipulation ¶ 33; Tr. 69-72. The Supreme Court Order of November 6, 2017 required Ms. Richey to advise the Court by November 21st as to whether files had been removed from the Property. Stipulation ¶ 34. On November 21st, she advised the Court that she had removed a large number of files and hoped to complete the process by the end of December 2017. *Id.* ¶ 35.

Over the course of 2018, GCK continued to request that Ms. Richey remove the files. *Id.* ¶ 39. In April 2018, Ms. Richey hired a firm to move them, and although the Attorney Discipline Office was required to again become involved, it appears that the files have now been moved to storage at a location maintained by that firm. Stipulation ¶¶ 38-49.

Ms. Richey testified that no client ever complained about the storage of their files, or of a breach of confidentiality. Tr. 76. Furthermore, the ADO agreed that there was no actual breach of client confidentiality. Tr. 76; ADO Memo on Sanctions ¶ 26.

During the Hearing, counsel for the ADO presented evidence of damage to GCK resulting from the storage of the files on the Property. *See* Hearing Exhibit 5. Among other

expenses said to have been incurred by GCK, Mr. Caputo testified to the purchase of boxes used to collect MLS records, invoices from a third party relating to the removal of computers and other materials from the basement, and minor expenses from the Town of Conway Solid Waste Facility concerning the disposal of some electronics. Exhibit 5; Tr. 31-36, 44-47. Mr. Caputo stated that the entire claim was “probably” \$1,000 to \$1,500. Tr. 50. He further stated that “I never really considered a claim or anything like that to get reimbursed for it. All I wanted was that the files that weren’t ours, be out of the property.” *Id.* He further stated that “the only reason we put the invoices together was we were asked to by the disciplinary office.” *Id.* 114.

Agreed Standards Relative to Possible Sanctions

In addition to the Stipulation, counsel for Ms. Richey and for the ADO agreed that the determination of sanctions involved two sections of the “Standards for Imposing Lawyer Sanctions” of the American Bar Association, as approved in February 1986, and as amended in February 1992. More specifically, counsel focused on two sections of the Standards, namely sections 4.13 and 4.14, relating to the appropriate sanctions for the “Failure to Preserve the Client’s Property.” In relevant part, Section 4.1 of the Standards provides as follows:

4.1 FAILURE TO PRESERVE THE CLIENT’S PROPERTY

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

* * *

- 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

The Standards also define factors that may be considered as aggravating or mitigating circumstances. In particular, Rule 9.21 defines aggravating circumstances as “any considerations or factors that may justify an increase in the degree of discipline to be imposed.” Rule 9.31 defines mitigating circumstances as those that “may justify a reduction in the degree of discipline.”⁹

Aggravating circumstances argued for by counsel for the ADO included Ms. Richey’s prior disciplinary offenses, a “pattern of conduct over three years,” and her “substantial experience in the practice of law.” ADO Memo on Sanctions ADO at 7-8; Standard 9.22. Counsel for the ADO conceded the mitigating circumstance that Ms. Richey experienced “significant personal problems for a considerable part of the time that she failed to remove client files.” *Id.* By contrast, counsel for Ms. Richey argued that the Hearings Committee should consider mitigating conditions, including cases of “minor misconduct,” “little or no injury to clients, the public, the legal system or the profession,” and “little or no likelihood of repetition.” Memo for Ms. Richey at 5.

Although the parties agreed on the Standards to be applied regarding the sanctions in this matter, they disagreed with the specific sanction to be applied. Counsel for the ADO contended that the appropriate sanction was that set out in Section 4.13 of the Standards and described as “reprimand,” but known as “censure” in New Hampshire. Counsel for Ms. Richey asserted that the appropriate sanction was that set out in Section 4.14, or an “admonition,” but known as “reprimand” in New Hampshire.

Counsel for the ADO argued that a censure was appropriate because the violation in this case implicated duties to third parties and that in this case, there was both the potential and the

⁹ The Standards have not been formally adopted by the New Hampshire Supreme Court, however, the Professional Conduct Committee applies the Standards, and the parties agreed that they were applicable to this matter.

fact of injury to GCK. Tr. 105-106, 113-114. He conceded, however, that there was no actual injury to a client in this matter. Tr. 109-110. Mr. Moushegian argued that even if Ms. Richey's conduct was considered to be negligent under Section 4.13, the aggravating factors justified a public censure. Tr. 107. He further asserted that even without the other disciplinary matters to which Ms. Richey had been subject, the ADO would have recommended a public censure. *Id.* 107-108.

Mr. Saturley, counsel for Ms. Richey, asserted that the Committee should issue a reprimand (or "admonition" as it is known in the Standards) consistent with Section 4.14. He noted that the Committee should consider three elements: duty, state of mind, and risk of injury to clients. Tr. 115. He conceded Ms. Richey's duty to the MLS clients. *Id.* He noted that Ms. Richey viewed this matter as primarily a landlord-tenant dispute and that at most, she had been negligent. *Id.* 115-116. On the risk of injury, he argued that the ADO had conceded the lack of actual client injury, and no client had complained about Ms. Richey's failure to remove the files. *Id.* He asserted that the Standards and Rules speak in terms of injury or potential injury to clients but not third parties, and that this matter was dissimilar to one cited by Counsel for the ADO and that involved property held in escrow for a third party. *Id.* 117.¹⁰ With respect to mitigating circumstances, he contended that the Committee should consider Ms. Richey's personal and professional challenges, and her disclosure of events to, and her cooperation with, the ADO.

Finally, the parties agreed that based on their respective arguments, the Committee could consider a censure (reprimand) under Section 4.13 and lower it—based on mitigation—to a reprimand (admonition) under the Standards, or alternatively start with Section 4.14 and raise the sanction to that in Section 4.13 based on aggravating circumstances.

¹⁰ The parties stipulated that the MLS files had been exposed—but not disclosed—to a third party, in the sense that they were in the possession of GCK. Tr. 118-119.

Committee Decision

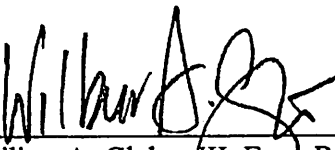
The Committee concluded that a reprimand is the appropriate sanction in this matter. There was essential agreement that the violations of the Rules stipulated to by Ms. Richey and the ADO resulted from Ms. Richey having been negligent in dealing with client property. She was presented with a difficult situation as a result of the retirement of Ms. Melendy and Ms. Lee. After being their partner for less than a year, she became responsible for all of their files. While there are steps that Ms. Richey could have taken to address client files (for example, contacting clients to determine whether they wanted files returned or destroyed), the evidence was that she was presented with a very difficult situation. Likewise, Ms. Richey could have been more diligent in addressing the removal of the files, and certainly should have responded more diligently to GCK's continued requests for their removal. Yet the evidence was that apart from her negligence in addressing the removal of the files, there was no actual injury to clients, and little or no potential injury to the clients because the files were stored in a safe location with no practical access to them by anyone other than Ms. Richey or a designated agent.

There were aggravating circumstances in this case, namely, Ms. Richey's prior discipline, and the fact she is an experienced attorney. There were also mitigating factors, including her divorce, the need to care for her mother (who was at least a two-hour drive away), and to care for her sister following the birth of a child and the suicide of her brother-in-law. While the Committee decided that a reprimand consistent with the "admonition" of Section 4.14 of the Standards is the appropriate sanction, that conclusion was reached after extended deliberation. Careful consideration was given to whether censure, consistent with "reprimand" described by Section 4.13 of the Standards, would be more appropriate in light of Ms. Richey's prior

disciplinary proceedings. These proceedings, and this one, reflect a troubling weakness in Ms. Richey's legal practice, namely, a tendency to avoid dealing with difficult issues or clients. In Ms. Richey's case, because this propensity has repeatedly brought her before the ADO, the Committee believe that this warrants immediate voluntary action on her part to avoid similar issues in the future. The Committee strongly recommends that Ms. Richey take remedial action to address this weakness.

In sum, the Committee finds that the appropriate sanction level in this case is that set out in Section 4.14 of the Standards, and that a reprimand should be issued.

Dated: June 18, 2019



Wilbur A. Glahn, III, Esq., Reporter
Barbara Keshen, Esq., Chairperson
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Richard Darling, Public Member
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