

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. LD-2019-0009, In the Matter of Mark S. Moeller, Esquire, the court on September 18, 2019, issued the following order:**

On July 18, 2019, Judge Larry Smukler, who was appointed to serve as the referee in this case, conducted an evidentiary hearing on the issue of whether Attorney Moeller's suspension from the practice of law is necessary for the protection of the public and the preservation of the integrity of the legal profession. See Rule 37(9)(i) and 37(16)(f); Gallant's Case, 170 N.H. 528, 533 (2017).

After the hearing, the referee submitted a report of his findings, rulings and recommendations to the court. The referee recommended that the court find and rule that:

- (1) Attorney Moeller's interim suspension is necessary for the protection of the public and the preservation of the integrity of the legal profession, see Sup. Ct. R. 37(16)(f);
- (2) the interim suspension does not apply to matters in which Attorney Moeller currently represents clients, see Sup. Ct. R. 37(9)(i);
- (3) Attorney Moeller shall not accept any new clients or new matters involving existing clients unless and until the interim suspension is lifted;
- (4) Attorney Moeller shall notify all his current clients of the indictment against him with specificity and provide the court with an affidavit that he has fully complied with this requirement within 30 days of the date of the court's order; and
- (5) Attorney Moeller shall keep the ADO and the court advised of the status of the criminal proceedings against him and shall notify the ADO and the court if additional parties are indicted in connection with this matter.

The referee's report was provided to the Attorney Discipline Office (ADO) and Attorney Moeller, and they were ordered to advise the court whether they intended to challenge the referee's factual findings and rulings of law, and his recommendation regarding interim suspension. The ADO notified the court that

it did not challenge the referee's factual findings, rulings of law or recommendation. Attorney Moeller advised the court that he did "not wish to challenge the findings of fact and rulings of law in this interim proceeding," but that he intended to continue to defend the pending criminal and professional conduct cases. Attorney Moeller asked the court to revise the referee's recommendation and allow him to undertake new clients and new matters for existing clients. The ADO filed an objection to Attorney Moeller's request to allow him to accept new clients and matters.

The court has carefully reviewed the referee's factual findings, rulings of law and recommendations, and the parties' responses. The court accepts the referee's recommendation that Attorney Moeller should be limited to representing existing clients in pending matters. It also accepts the referee's recommendation that Attorney Moeller should be required to notify his clients of the indictment against him, and to keep the ADO and this court advised of the status of the criminal proceedings. Accordingly, the court orders:

- (1) Attorney Moeller may continue to practice law but only to the following extent. He may represent existing clients in pending matters. He shall not accept any new clients or new matters involving existing clients unless and until the interim suspension is lifted.
- (2) Attorney Moeller shall consult the ADO if he is uncertain in any instance whether continued representation of a client is permitted under this order.
- (3) Attorney Moeller shall notify all of his current clients of the indictment against him with specificity and shall provide the court with an affidavit that he has fully complied with this requirement within 30 days of the date of this order.
- (4) Attorney Moeller shall keep the ADO and the court advised of the status of the criminal proceedings against him and shall notify the ADO and the court if additional parties are indicted in connection with this matter.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

**Eileen Fox,  
Clerk**

Distribution:  
Russell F. Hilliard, Esquire  
Mark P. Cornell, Esquire  
File

The State Of New Hampshire  
Supreme Court

Docket No. LD-2019-0009

In the Matter of Mark S. Moeller, Esq.

Referee's Recommendations

On June 20, 2019, Attorney Mark S. Moeller was indicted by the Strafford County Grand Jury for solicitation of forgery. *See* RSA 629:2 (2016); RSA 638:1 (2016). The indictment alleges that he requested his assistant to execute a client's signature on a fee agreement between the client and Moeller without the client's authority. Moeller entered a plea of not guilty.

On July 8, 2019, the Attorney Discipline Office (ADO) filed a certified copy of the indictment with the New Hampshire Supreme Court and recommended that the court institute proceedings pursuant to Supreme Court Rule 37(9)(i). On July 9, 2019, the court imposed an interim suspension, temporarily suspending Moeller from the practice of law. *See Sup. Ct. R. 37(9)(i); 37(16)(f)*. Moeller requested a hearing on the interim suspension. *See Sup. Ct. R. 37(16)(d); Reiner's Case*, 152 N.H. 594, 595 (2005) (*Reiner II*); *Reiner's Case*, 152 N.H. 163, 167 (2005) (*Reiner I*). He also moved to stay the interim suspension, pending the hearing, with the condition that he "not accept any new clients." The ADO did not object to staying the interim suspension on that condition.

The hearing on the interim suspension was held before the undersigned Justice, as referee, on July 18, 2019. Moeller was represented by Russell Hilliard, Esq. of Upton & Hatfield, LLP. Moeller's criminal counsel was also present. The ADO was represented by Mark Cornell, Esq. and Andrea Labonte, Esq. The ADO proceeded by offer of proof. Moeller presented evidence; specifically, his own testimony and that of his assistant and a character witness. Because the ADO has sustained its burden of showing by a

preponderance of the evidence that a partial interim suspension is necessary for the protection of the public and the preservation of the integrity of the legal profession, I recommend that the interim suspension be imposed in accordance with the conditions set forth below.

### **Facts**

In March 2017, Moeller filed a limited appearance to represent a client at a March 27, 2017 hearing. On March 13, under a short deadline, Moeller prepared a memorandum of law for the client to submit to the trial court. Moeller's assistant prepared a fee agreement. Moeller testified that it was a "chaotic afternoon." Moeller and the assistant testified that the client signed the fee agreement on March 13, when he was given the memorandum. The assistant testified that the file was in "disarray." The ADO proffered that the client would testify that he never signed the fee agreement. On June 22, 2017, the client left Moeller a voicemail message stating that the client knew he "did not sign the representation agreement" and that this was "unintentional." On September 18, 2017, the client told the police a different story—that "he never signed [the retainer contract] because he did not like or want to be bound [by] the contract."

On April 17, 2017, Moeller drafted a replication as requested by the client. The assistant testified that the client came to the office that day, read the draft replication, and announced that it was not what he wanted and that he would not file it with the trial court. She further testified that the client did not sign the replication in the office. The client stated in a July 2017 e-mail to the assistant that he signed the replication on April 17 in front of her to "appease" her. His signature was not notarized, although the assistant is a notary, and Moeller did not sign the certificate of service. The assistant testified that, if the client had signed the replication in her presence, she would have notarized his signature. In September 2017, the client told police that he prepared, signed, and filed a motion with the court on April 17, 2017 and then

supplied Moeller with a copy of it. The trial court's docket reflects that on April 17, 2017, the client filed a motion for contempt.

On April 28, 2017, a credit card that the client had used to pay for a portion of Moeller's services notified Moeller that it was going to "chargeback" that payment and that the "Reason Code" was "Services Not Provided." To rebut the chargeback, the credit card company requested that Moeller provide a "written rebuttal, signed fee agreement, signed authorization form/receipt, and proof of services rendered." (Bolding omitted.) Moeller promptly telephoned the client and left a strongly worded voice message. Moeller said that he was "beyond offended" that the client was attempting to renege on his fee payment and that he intended to "fight this to the bitter end." At the end of his message, Moeller failed to hang up his phone and, as a result, a portion of his subsequent conversation with the assistant was also recorded.

Moeller said to the assistant, "We want to contest it in every which way." The assistant responded, "Absolutely. We have to do a written rebuttal, a fee agreement. I hope he signed one." Moeller said, "I hope he did, too." The assistant responded, "We'll forge his name. I don't care. I bet he didn't. I bet he just took it as - - ." Moeller stated, "Yeah, it wouldn't shock me." The assistant said, "Yep, no fee agreement. He didn't sign it. It's here, I have it here, I prepared it. Nope. He never signed it. Awesome." Moeller queried, "Can you sign his name?" The assistant responded, "Nope, he didn't sign it." Moeller repeated, "I said, can you sign his name." After some further discussion, much of which is inaudible, the recording ends. Moeller testified that he did not need a fee agreement to recover from the credit card company. The assistant testified that, after "rummaging through" the entire file, she found the signed fee agreement in a folder in which it did not belong.

Ultimately, Moeller disputed three separate chargebacks by the client. In each, he submitted a copy of a signed fee agreement as part of his proof that he was entitled to the money charged. The client repeatedly demanded that Moeller send him a signed copy of the replication. Both the assistant and

Moeller told the client that they did not have a copy of the replication with his signature. On July 17, 2017, the assistant e-mailed the client an unsigned copy of the replication.

At the interim suspension hearing, the ADO submitted enlarged copies of the client's signature on transparent acetate. One of the signatures was from the fee agreement submitted to a credit card company. The other was purportedly from the replication, which had been supplied to the police by the client. Placing the transparent sheets one on top of the other demonstrates that every aspect of the two signatures is identical. This supports a finding that one of the signatures was taken from one document and placed on the other.

### **Analysis**

The ADO has the burden of showing, by a preponderance of the evidence, that the interim suspension is necessary for the protection of the public and the preservation of the integrity of the legal profession. *Gallant's Case*, 170 N.H. 528, 535 (2017); *Sup. Ct. R.* 37(16)(f). It does not need to prove that the allegations in the indictment are true. *Reiner I*, 152 N.H. at 169. To meet this burden, the ADO may supplement the allegations in the indictment with additional evidence. *Id.* at 170. "The function of a standard of proof ... is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *State v. Ploof*, 162 N.H. 609, 623 (2011), quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979). "The standard serves to allocate the risk of error between the litigants." *Id.*

"[P]roof by preponderance 'means that evidence, taken as a whole, shows that [the] fact ... to be proven is more probable than not.'" *Petition of Preisendorfer*, 143 N.H. 50, 54 (1998), quoting *State v. 77,014.00 Dollars*, 607 So.2d 576, 581-82 (La.Ct.App. 1992). "[T]he 'preponderance standard allows for the balancing of evidence from both sides.'" *Id.*, quoting *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994).

“The injury to the public and to the profession is substantial whenever an attorney is dishonest.” *Gallant*, 170 N.H. at 538. “No single transgression reflects more negatively on the legal profession and erodes public confidence in the bar more completely than a lie.” *Id.* (quotations omitted). “This is because the privilege of practicing law includes the concomitant responsibilities of truth, candor and honesty.” *Id.* (quotation omitted). “Lawyering involves a public trust and requires an unswerving allegiance to honesty and integrity.” *Id.* (quotation omitted). “Accordingly, it is the responsibility of every attorney at all times to be truthful.” *Id.* (quotation omitted).

In this case, the ADO has sustained its burden of showing that Moeller’s alleged conduct damages the integrity of the legal system. “A lawyer charged with such offenses ... cannot help but be looked upon by the public with untrusting eyes and that perception cannot help but be reflective upon the bar as a whole.” *Reiner II*, 152 N.H. at 596.

The issue of whether Moeller’s conduct threatens the public is closer. First, Moeller contends that the evidence does not support a finding that he asked his assistant to forge the client’s signature on the fee agreement. Instead, he posits that the client transferred his own signature from the fee agreement to the replication to support his claim that he never signed the fee agreement and thereby to avoid paying Moeller.

At the interim suspension hearing, both Moeller and the assistant testified that they clearly and specifically recalled the client signing the fee agreement on March 13. Yet the recording of their dialog on April 28 demonstrates that, just a few weeks after they claim the client signed the fee agreement, neither of them could recall whether the client had done so. Moeller asserts that “[i]n the upset ... upon learning of [the client’s] fraudulent attempt to avoid payment, a less than immediate recollection [that the client had signed the fee agreement] ... is understandable.” The record does not support this assertion.

At the interim hearing, Moeller characterized his April 28 recorded conversation with the assistant as “flip” and “nonserious.” On the contrary, the recording reflects that he and the assistant were angry, not speaking lightly or with humor. This is consistent with Moeller’s own description of his emotional response to the chargeback as moving from “extreme hurt” to “disbelief,” and, finally, to anger. Furthermore, when presented with the copies of the two signatures on the transparent acetate sheets, Moeller refused to acknowledge that they were identical; he testified only that they were “similar.”

Moeller contends that the proposition that he solicited forgery depends upon the premise that he planned the forgery when the replication was drafted, well before the client contested his bill. I disagree. The client could have signed the replication for any number of reasons, and that document could have been merely chosen from many documents signed by the client as the one from which to transfer the client’s signature. Moeller points to the assistant’s handwritten note on the top of the transmittal letter for the replication stating that the client did not file the replication. That note, however, does not indicate whether the client signed the replication.

Moeller points accurately to many instances of “demonstrably false, inconsistent, and nonsensical information” that the client provided under oath and to the police. While this strongly supports a reasonable doubt argument on the underlying criminal charge, it does not affect the instant analysis. Under the preponderance standard, I must balance the client’s credibility against the inconsistencies in Moeller’s and the assistant’s testimony. *See Preisendorfer*, 143 N.H. at 54.

Second, Moeller argues that he poses no danger to the public because: (1) the alleged incident is isolated; (2) it is alleged to have occurred more than two years ago, with nothing remotely similar in the interim; (3) he has been practicing for more than 40 years; and (4) the only other disciplinary action against him was a reprimand in 1999 for knowingly disobeying a court order, for which he accepted full responsibility at the time.

Although Moeller is charged with only one count of solicitation of forgery, he is also alleged to have repeatedly misrepresented facts to his client, to the credit card companies, and to the ADO. Additionally, he repeated these facts in sworn testimony at the interim hearing. *See Gallant*, 170 N.H. at 538 (repeated statements to client and others in single matter were “part of a pattern of dishonesty”). Furthermore, Moeller’s alleged acts directly threaten present and future clients. *Cf. Reiner II*, 152 N.H. at 598 (no interim suspension necessary, in part, because attorney was not alleged to have “misused clients’ funds, made false statements or engaged in other conduct which poses an immediate threat to clients or to the public”). Accordingly, I find and conclude that it is more probable than not that the allegations against Moeller necessitate his interim suspension for the protection of the public. *See Preisendorfer*, 143 N.H. at 54.

As indicated above, the ADO did not object to a stay of the interim suspension pending hearing, subject to the condition that Moeller not accept any new clients. I recommend that the interim suspension continue to be stayed to the extent that it applies to matters in which Moeller is currently representing clients who, after notice, wish to have that representation continue.


I make this recommendation for several reasons. First, as indicated, the facts are contested. I recognize the strength of Moeller’s ultimate claim of reasonable doubt in the underlying criminal proceeding. Second, the alleged solicitation occurred more than two years ago, with nothing remotely similar in the interim. Finally, Moeller is a solo practitioner who has practiced for more than 40 years. He specializes in representing clients in complex and contentious family law matters. He testified that he takes cases that other attorneys will not take. His existing clients would have difficulty finding effective substitute representation on short notice. Furthermore, a substitute attorney may not be able to step into these kinds of matters quickly or without significant expense to the client.

## Conclusion

Based upon the ADO's proffer and the evidence presented at the interim suspension hearing before me, I recommend that the court find and rule that:

- (1) Moeller's interim suspension is necessary for the protection of the public and the preservation of the integrity of the legal profession, *see Sup. Ct. R. 37(16)(f)*; and
- (2) the interim suspension does not apply to matters in which Moeller currently represents clients, *see Sup. Ct. R. 37(9)(i)*; and
- (3) Moeller shall not accept any new clients or new matters involving existing clients unless and until the interim suspension is lifted; and
- (4) Moeller shall notify all his current clients of the indictment against him with specificity and provide the court with an affidavit that he has fully complied with this requirement within 30 days of the date of the court's order; and
- (5) Moeller shall keep the ADO and the court advised of the status of the criminal proceedings against him and shall notify the ADO and the court if additional parties are indicted in connection with this matter.

Respectfully submitted,

/s/ 

Larry M. Smukler, Referee

August 8, 2019

THE SUPREME COURT OF NEW HAMPSHIRE

LD-2019-0009

In the Matter of Mark S. Moeller, Esq.

ASSENTED TO MOTION TO VACATE INTERIM SUSPENSION

Mark S. Moeller, Esq., respondent in the above matter, hereby moves to vacate the interim suspension ordered by this Court on September 18, 2019, on the following grounds:

1. The interim suspension of Attorney Moeller resulted from a recommendation of the Attorney Discipline Office (ADO) following an indictment against him in the Strafford County Superior Court issued on June 20, 2019, alleging the crime of criminal solicitation of another to engage in conduct constituting the crime of forgery. *See* Indictment attached as Exhibit 1; *see also* RSA 629:2 (solicitation) and RSA 638:1 (forgery).
2. The conduct alleged in the indictment was a “request [...] to execute the signature of Timothy Sanborn onto a fee agreement without the authority of Sanborn so that it purported to be the act of Sanborn.”
3. Attorney Moeller had represented Mr. Sanborn in a post-divorce dispute, been paid via credit card charge, and Mr. Sanborn had later challenged the charge, alleging “Services Not Provided.”
4. The criminal case came on for trial in the Strafford County Superior Court on February 3, 2020, and at the close of the State’s case on February 6, 2020, the presiding judge granted Attorney Moeller’s motion to dismiss. *See* Exhibit 1 (note at foot).

5. The motion to dismiss was premised on the fact that the undisputed evidence *as presented by the State* demonstrated that the services paid for by the credit card charge had in fact been provided by Attorney Moeller to Mr. Sanborn, and further that Mr. Sanborn had authorized the credit card charge to be made. Accordingly, there was no intent to defraud, as required for the crime of forgery by RSA 638:1 (“with purpose to defraud anyone”).

6. Given that the services had been provided and the credit card charge authorized, and further that the credit card issuer (bank) determined not to credit Mr. Sanborn’s account, it was legally impossible for Attorney Moeller to have had a purpose to defraud either Mr. Sanborn or the bank.

7. As of this filing, the Attorney Discipline Office has not issued any notice of charges arising out of these circumstances.

8. The Attorney Discipline Office assents to this motion.

9. For these reasons, the interim suspension should be vacated.

Respectfully submitted,

Mark S. Moeller, Esq.

By his Attorneys,  
**UPTON & HATFIELD, LLP**

Date: February 10, 2020

/s/ Russell F. Hilliard  
Russell F. Hilliard  
NHBA #1159  
159 Middle Street  
Portsmouth, NH 03801  
(603) 436-7046  
rhilliard@uptonhatfield.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing was this day forwarded to Mark P. Cornell, Deputy General Counsel, Attorney Discipline Office, through the Court's electronic filing system.

/s/ Russell F. Hilliard

Russell F. Hilliard

D.O.B. [REDACTED]

LOE: B

RSA Ch. 629:2, 638:1  
Criminal Solicitation, forgery  
Class B Felony  
3 1/2 to 7 years NHSP \$4,000.00 fine

STRAFFORD, SS. STATE OF NEW HAMPSHIRE SUPERIOR COURT

INDICTMENT

At the Superior Court holden at Dover, within and for the County of Strafford aforesaid, in the month of JUNE, in the year of TWO THOUSAND AND NINETEEN, the GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, on their oath, present that:

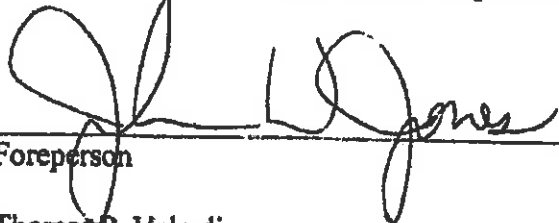
MARK MOELLER  
20 MELODY TR.  
DOVER, NH 03820

On or about the 28<sup>th</sup> day of APRIL, 2017, at DOVER in the County of Strafford aforesaid, did commit the crime of Criminal Solicitation in that the defendant did;

1. With a purpose
2. that Jennifer Berard engage in conduct constituting the crime of forgery
3. He requested Berard engage in such conduct
4. by requesting her to execute the signature of Timothy Sanborn onto a fee agreement without the authority of Sanborn so that it purported to be the act of Sanborn, said agreement being an instrument representing an interest in or a claim against property and/or a pecuniary interest in or claim against a person

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.  
Date: 6-20-2019

  
\_\_\_\_\_  
Foreperson

Thomas P. Velardi,  
Strafford County Attorney

By:

  
\_\_\_\_\_

Timothy J. Sullivan, NHBA # 17432

Motion to Dismiss Granted - See Record 2/6/20

April J. Cote, Deputy Clerk of Court

SSC#219-2019 CR 449

CHG ID# 11-35537C

**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**ORDER**

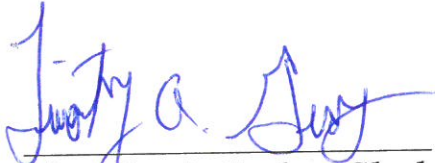
**LD-2019-0009, In the Matter of Mark S. Moeller, Esquire**

Attorney Mark S. Moeller's assented-to motion to vacate interim suspension is granted. Accordingly, the interim suspension of Attorney Moeller, as ordered by the court on September 18, 2019, is vacated, effective immediately.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

DATE: February 13, 2020

ATTEST:

  
\_\_\_\_\_  
**Timothy A. Gudas, Clerk**

Distribution:  
Russell F. Hilliard, Esquire  
Mark P. Cornell, Esquire  
File