

New Hampshire Supreme Court  
**Professional Conduct Committee**

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**TWO YEAR SUSPENSION**

The above-referenced matter comes before the Professional Conduct Committee pursuant to Sup. Ct. R. 37A(III)(d)(2). By letter from Disciplinary Counsel, Landya B. McCafferty dated December 6, 2004, the Committee was advised that Attorney McCafferty and the Respondent's attorney, Michael Shklar, Esquire, waived oral argument before the Committee pursuant to Sup. Ct. R. 37A(III)(d)(2)(B).

On January 18, 2005, the Professional Conduct Committee deliberated this matter. Members present included: Margaret H. Nelson, Chair; Benette Pizzimenti, Vice Chair and Reporter; Alan J. Cronheim; Toni M. Gray, Vice Chair; James R. Martin; Richard B. McNamara; David N. Page, Stephen Stepanek, David N. Cole and Thomas P. Connair. Nancy R. Hacking and Gretchen Rule Hamel did not participate.

The Professional Conduct Committee thoroughly reviewed the record in this matter which includes: Respondent's Motion to Dismiss, Respondent's Motion to Extend, Notice of Charges, Objection to Motion to Dismiss, Objection to Motion to Extend, Hearing Panel Appointment, Notice of Hearing, Stipulation (draft), Stipulation, the transcript of November 19, 2004 Hearing, Hearing Panel Report dated December 2, 2004, and various correspondence, including letters from Attorney McCafferty dated December 6, 2004 and January 7, 2005. In the latter letter, the Committee was advised that there was no understanding between Attorney McCafferty and Attorney Shklar whether the stipulated sanctions in this matter and in another pending matter, *In the Matter of Mark E. Wolterbeek*, LD 2003-0009, would run consecutively or concurrently.

Having reviewed the record, the Professional Conduct Committee has determined that the record supports the following factual findings and rulings of the Hearing Panel by clear and convincing evidence. The factual findings and rulings of law are detailed below.

**I. FACTUAL FINDINGS**

1. In a letter notarized on September 24, 2003, Richard J. Schneider made allegations of

professional misconduct against Mark E. Wolterbeek.

2. Mr. Schneider, and his then-wife, Dolores A. Schneider, had owned the Village Grocery Store and its premises on the Rindge Common in Rindge, New Hampshire (real estate and store referred to collectively a "Village Grocer") since 1985.
3. In 1994, Mr. Wolterbeek assisted Mr. Schneider in resolving financial troubles he was experiencing with his mortgage holder, Shawmut Bank. An agreement was reached which avoided foreclosure at that time.
4. In 1995, Mr. Wolterbeek and his then-wife, Susan K. Wolterbeek, had a law office next door to the Village Grocer.
5. In early 1995, Ms. Wolterbeek represented Mr. Schneider in his divorce.
6. Per the terms of the divorce decree, Mr. Schneider received the Village Grocer, but Ms. Schneider's name remained on the deed.
7. Also in 1995, Mr. Schneider began experiencing serious financial difficulties.
8. In late 1995, Mr. Wolterbeek advised Mr. Schneider it would be in his best interest to file for bankruptcy, and Mr. Wolterbeek agreed to represent him.
9. At the time that Mr. Schneider's bankruptcy petition was being prepared, Shawmut Bank was in the process of foreclosing on the Village Grocer.
10. In or about October, 1995, Shawmut Bank held a foreclosure auction at which there were no bidders.
11. Although Shawmut Bank could have prepared a foreclosure deed and taken title to the property at any time after that auction, the Bank never recorded a foreclosure deed.
12. Mr. Wolterbeek had communicated to the Bank his concerns with respect to the existence of gasoline pumps and gasoline underground storage tanks that used to exist on the property. Due in large part to environmental concerns with respect to the Village Grocer, the Bank was not interested in becoming a record owner of the Village Grocer.
13. Mr. Wolterbeek and Ms. Wolterbeek developed an interest in purchasing the Village Grocer. Mr. Wolterbeek and Ms. Wolterbeek believed that the Village Grocer could be profitable at some point in the future.
14. According to an Affidavit Mr. Wolterbeek filed in the Cheshire County Registry of Deeds (Vol. 2008, Page 0135), Mr. Wolterbeek and Ms. Wolterbeek formed REMY Limited Partnership on or about October 10, 1995. According to that Affidavit, the "only partners to

the Limited Partnership” were Mr. Wolterbeek, Ms. Wolterbeek, and George Chapman.

15. Although the REMY Limited Partnership agreement was purportedly signed on or about October 10, 1995, Mr. Wolterbeek did not register the Partnership at that time with the New Hampshire Secretary of State.
16. On October 30, 1995, REMY Limited Partnership purchased from Shawmut Bank the three mortgages the Schneiders owed to the Bank for the Village Grocer. See Cheshire County Registry of Deeds (Vol. 1540, Page 0071). According to the Quitclaim Deed, REMY Limited Partnership paid Shawmut \$25,000.00 for these three mortgages.
17. In his negotiations with Shawmut Bank, Mr. Wolterbeek did not disclose his personal involvement in REMY Limited Partnership. Mr. Wolterbeek described REMY Limited Partnership to Shawmut Bank as a “group of investors.”
18. Mr. Wolterbeek also failed to inform his then-client, Mr. Schneider, of both Mr. Wolterbeek’s involvement in REMY Limited Partnership as well as his interest in the Village Grocer.
19. As of the date that Mr. Wolterbeek purchased the three mortgages on the Village Grocer from Shawmut Bank, Mr. Wolterbeek became the holder of mortgages on property for which his then-client, Mr. Schneider, still held record title.
20. On October 31, 1995, Mr. Schneider executed a “Quitclaim In Lieu Of Foreclosure” (“Quitclaim Deed”), transferring title to the Village Grocer to REMY Limited Partnership.
21. Mr. Wolterbeek drafted the Quitclaim Deed.
22. In the fifth paragraph of the Quitclaim Deed, it states:

I understand that there is an investment group called REMY Limited Partnership, which paid Shawmut Bank \$25,000 for assignment of its mortgage. REMY Limited Partnership is taking on this property knowing of the environmental problems and unpaid real estate taxes and said limited partnership has agreed to indemnify me from any liability of this real property, especially in regard to environmental and tax liability.
23. The signatories on the Quitclaim Deed are Mr. Schneider and Mr. Chapman. Mr. Chapman is described on the Quitclaim Deed as a “limited partner” of “REMY Limited Partnership.” The witnesses to those signatures are Ms. Wolterbeek and Mr. Wolterbeek.
24. Mr. Schneider and Mr. Chapman were not in one another’s presence while signing the Quitclaim Deed. At the time he signed the Quitclaim Deed, Mr. Schneider did not know Mr. Chapman. To date, Mr. Schneider has never met Mr. Chapman.

25. At the time that Mr. Schneider signed this document, Mr. Schneider had no knowledge or awareness that Mr. Wolterbeek and Ms. Wolterbeek were in any way involved in REMY Limited Partnership.
26. Mr. Wolterbeek was aware at the time that he acquired the mortgages from Shawmut Bank that Mr. Wolterbeek was involved in a business transaction adverse to his then-client, Mr. Schneider.
27. On November 3, 1995, Mr. Wolterbeek filed a Chapter 7 Bankruptcy Petition on behalf of Mr. Schneider ("the Petition"). Mr. Schneider executed the Petition on October 27, 1995.
28. The Petition indicates that Mr. Schneider owned no real estate at the time. However, as of October 27, 1995, the date Mr. Schneider executed the Petition, Mr. Schneider still held record title to the Village Grocer.
29. In the section of the Petition entitled "Statement of Financial Affairs," question 10 asks the debtor:

List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case. . . .
30. In answer to question 10, the Petition states, "none."
31. At no place in the Petition did Mr. Wolterbeek, on behalf of Mr. Schneider, disclose the acquisition by REMY Limited Partnership of Mr. Schneider's Shawmut Bank mortgages.
32. Additionally, at no place in the Petition did Mr. Wolterbeek, on behalf of Mr. Schneider, disclose his transfer to Mr. Wolterbeek and Ms. Wolterbeek, as general partners in REMY Limited Partnership, of title to the Village Grocer.
33. In "Schedule D," entitled "Creditors Holding Secured Claims," Mr. Wolterbeek listed Shawmut Bank as having a mortgage on the Village Grocer in an amount valued at \$169,276.98. Mr. Wolterbeek listed the unsecured portion of that mortgage as valued at \$144,276.98. Mr. Wolterbeek listed the market value of the Village Grocer at \$25,000.00.
34. Notably, as of the date that Mr. Wolterbeek filed the Petition, Shawmut Bank was no longer a "secured creditor" of the Village Grocer. As of the date Mr. Wolterbeek filed the Petition, the entity holding the mortgages on the Village Grocer was REMY Limited Partnership. Mr. Wolterbeek did not, however, list REMY Limited Partnership as a secured creditor.
35. In the section of the Petition entitled "Statement Of Financial Affairs," question 5 asks the debtor:

List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within one year immediately preceding the commencement of this case. . . .

36. In answer to "Question 5," Mr. Wolterbeek included the fact of the foreclosure on the Village Grocer by Shawmut Bank. Mr. Wolterbeek's answer to this question implies that Shawmut Bank foreclosed in October 1995 but does not mention the fact that Shawmut assigned the mortgages to REMY Limited Partnership.
37. In answering Question 5, Mr. Wolterbeek also failed to mention the Quitclaim Deed, by which Mr. Schneider had, only a few days before Mr. Wolterbeek filed the Petition, transferred the Village Grocer "through a deed in lieu of foreclosure."
38. In mid-November 1995, during the pendency of his bankruptcy, Mr. Schneider moved to Florida. The official meeting of creditors in Mr. Schneider's case took place on December 7, 1995, via a telephone conference call between the Chapter 7 Trustee, Mr. Wolterbeek, and Mr. Schneider (in Florida).
39. On February 6, 1996, Mr. Schneider received a bankruptcy discharge.
40. On April 8, 1996, REMY Limited Partnership obtained a \$75,000.00 loan secured by the Village Grocer from Granite Bank. Mr. Wolterbeek and Ms. Wolterbeek signed the mortgage agreement as general partners of REMY Limited Partnership.
41. The day after securing this loan, April 9, 1996, Mr. Wolterbeek filed a "Certificate of Limited Partnership" to register REMY Limited Partnership with the New Hampshire Secretary of State. Mr. Wolterbeek signed on behalf of himself and Ms. Wolterbeek, as general partners. In the "Certificate of Limited Partnership," Mr. Wolterbeek listed the name of the partnership as "REMY Real Estate Limited Partnership."
42. In the Fall of 2002, Mr. Schneider returned to live in New Hampshire. While in New Hampshire, Mr. Schneider visited Mr. Wolterbeek at his law office, which was now located in the Village Grocer building. At that time, Mr. Schneider was aware that Mr. Wolterbeek owned the Village Grocer, but he did not ask for an explanation. Mr. Schneider assumed that, after his departure to Florida, Mr. Wolterbeek had purchased the Village Grocer from REMY Limited Partnership.
43. On October 10, 2002, Mr. Schneider, per Mr. Wolterbeek's request, signed a "Corrective Quitclaim Deed" to correct the name of the grantee from "REMY Limited Partnership" to "REMY Real Estate Limited Partnership."
44. At the time Mr. Schneider signed this "Corrective Quitclaim Deed," he still did not know Mr. Wolterbeek was involved in either REMY Limited Partnership or REMY Real Estate

Limited Partnership.

45. On May 13, 2003, acting as general partner for "REMY Real Estate Limited Partnership," Mr. Wolterbeek refinanced the mortgage on the Village Grocer. Per the terms of the refinancing, REMY Real Estate Limited Partnership obtained a \$125,000.00 loan secured by the Village Grocer from Granite Bank. See Cheshire County Registry of Deeds (Vol. 2008, Pages 0138-0145).
46. On May 14, 2003, Mr. Wolterbeek filed an Affidavit with the Cheshire County Registry of Deeds clarifying that the names "REMY Limited Partnership" and "REMY Real Estate Limited Partnership" referred to the same entity. In that affidavit, Mr. Wolterbeek stated that Ms. Wolterbeek had withdrawn as a partner, and "the remaining partners are Mark E. Wolterbeek (general partner), and George A. Chapman (limited partner)."
47. On that same date, Mr. Wolterbeek filed the "Corrective Quitclaim Deed."
48. On or about August 4, 2003, Geraldine B. Karonis, the United States Trustee, filed a pleading entitled "Ex Parte Motion of United States Trustee for Order Reopening Case and to Authorize Appointment of Chapter 7 Trustee."
49. In that pleading, Ms. Karonis sought a re-opening of Mr. Schneider's bankruptcy on the grounds of information contained in the Cheshire Register of Deeds regarding the Village Grocer which neither Mr. Schneider nor Mr. Wolterbeek had disclosed in the Petition. Ms. Karonis was concerned that a fraud had been perpetrated on the Bankruptcy Court.
50. Ms. Karonis began an investigation into the circumstances surrounding Mr. Schneider's previous ownership of the Village Grocer. On August 7, 2003, Brian F. Tierney, CPA, Bankruptcy Analyst at the Office of the United States Trustee, interviewed Mr. Schneider over the telephone. On August 13, 2003, Mr. Schneider met at length with Mr. Tierney and Ms. Karonis at Ms. Karonis' office in Manchester, New Hampshire.
51. As a result of his discussions with Mr. Tierney and Ms. Karonis, Mr. Schneider learned for the first time of Mr. Wolterbeek's involvement in REMY Limited Partnership, a.k.a. REMY Real Estate Limited Partnership.
52. Thereafter, on September 24, 2003, Mr. Schneider filed this complaint against Mr. Wolterbeek.

## II. RULINGS OF LAW

Based on the above listed facts, the Professional Conduct Committee concludes that there is clear and convincing evidence that Mark Wolterbeek has violated the following Rules of Professional Conduct:

Rule 1.7(b): Conflict of Interest

53. Mr. Wolterbeek's conduct in acquiring the three Village Grocer mortgages from Shawmut Bank and thereby becoming the holder of notes on which his then-client, Mr. Schneider, was the obligor constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.7(b).
54. Mr. Wolterbeek's failure to disclose his involvement in REMY Limited Partnership to Mr. Schneider is indicative of Mr. Wolterbeek's awareness of the conflict of interest.
55. Even if this were a waivable conflict of interest, Mr. Wolterbeek never disclosed the existence of the conflict to Mr. Schneider so that he could consent "after consultation and with knowledge of the consequences."

Rule 1.8(a): Prohibited Transactions

56. Mr. Wolterbeek's conduct in acquiring the three Village Grocer mortgages from Shawmut Bank on behalf of REMY Limited Partnership without disclosing Mr. Wolterbeek's involvement in that purchase to his then-client, Mr. Schneider, constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.8(a).
57. Mr. Wolterbeek's conduct in drafting the subsequent Quitclaim Deed, whereby his then-client, Mr. Schneider, transferred title in the Village Grocer to REMY Limited Partnership while unaware of Mr. Wolterbeek's involvement in REMY Limited Partnership, constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.8(a).

Rule 3.3(a)(1): Candor to the Tribunal

58. Mr. Wolterbeek failed to disclose to the Bankruptcy Court in the Petition the following material facts: (a) that Mr. Schneider still held title to the Village Grocer as of October 27, 1995, the date he signed the Petition; (b) that, on October 30, 1995, four days before Mr. Wolterbeek filed the Petition, REMY Limited Partnership acquired the Village Grocer mortgages from Shawmut Bank for \$25,000; and (c) that on October 31, 1995, three days before Mr. Wolterbeek filed the Petition, Mr. Schneider transferred title to the Village Grocer to REMY Limited Partnership in lieu of foreclosure.
59. By failing to provide complete answers to the questions in the Petition, Mr. Wolterbeek rendered the Petition false and misleading in material respects.
60. Mr. Wolterbeek's conduct in filing the false and misleading Petition constitutes clear and convincing evidence of a violation of N.H. R. Prof. Conduct 3.3(a)(1).

Rule 8.4(c): Conduct involving Dishonesty, Fraud, Deceit and Misrepresentation

61. Mr. Wolterbeek's conduct in failing to disclose to Mr. Schneider his involvement in REMY Limited Partnership constitutes clear and convincing evidence of conduct involving dishonesty, fraud, deceit and misrepresentation in violation of N.H. R. Prof. Conduct 8.4(c).

Rule 8.4(a): Catch-all rule

62. Because there exists clear and convincing evidence that Mr. Wolterbeek violated the above rules, there is necessarily clear and convincing evidence of a violation of N.H. R. Prof. Conduct 8.4(a).

**III. SANCTION**

Having made the aforementioned findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter is a two year suspension. This sanction is in accord with the purposes of attorney discipline as described by the New Hampshire Supreme Court *See, e.g., Feld's Case*, 149 N.H. 19, 28 (2002). This sanction is also in accord with the ABA Center for Professional Responsibility, *Standards for Imposing Lawyer Sanctions* (1991). *See, e.g., Shillen's Case*, 149 N.H. 132, 139 (2003) (noting that, although the Court has never formally adopted these Standards, the Court has "considered them when imposing sanctions"). The sanction is consistent with the recommendation of the Hearing Panel and the stipulation of Disciplinary Counsel and Mark Wolterbeek. The Committee adopts the terms of the stipulation as follows:

1. A two-year suspension is consistent with New Hampshire case law and the goals of attorney discipline.
2. Under New Hampshire case law, the goals of attorney discipline are four-fold: (1) protect the public; (2) maintain the public confidence in the bar; (3) preserve the integrity of the legal profession; and (4) prevent similar conduct in the future. *See, e.g., Feld's Case*, 149 N.H. 19, 28 (2002). "Lawyer discipline is not intended to be punishment." *Id.*
3. A two-year suspension addresses the purposes of attorney discipline. First, the public is protected by the removal of Mr. Wolterbeek from the practice of law for a significant period of time. Additionally, the public will be notified and have an opportunity to respond at such time in the future that Mr. Wolterbeek seeks reinstatement to the Bar. N.H. Sup. Ct. R. 37(14)(b).
4. Second, a two-year suspension will promote both public confidence in the Bar and preserve the integrity of the legal profession. Mr. Wolterbeek's misconduct is severe and deserving of a harsh sanction. Depriving Mr. Wolterbeek of his license to practice his profession for a significant time-period is the only way in which public confidence in this Bar can be

maintained and the integrity of this profession preserved.

5. Finally, a two-year suspension will prevent similar misconduct in the future by sending a strong message to attorneys, in addition to Mr. Wolterbeek, that a harsh sanction is meted out for misconduct of this magnitude.
6. In cases involving deceit, the New Hampshire Supreme Court has issued a spectrum of sanctions, from public censure on the low end, see O'Meara's Case, 150 N.H. 157 (2003), to disbarment on the high end. See Basbanes' Case, 141 N.H. 1, 8 (1996).
7. Because the Court has held that "[e]very case is to be judged on its own facts and circumstances," Flint's Case, 133 N.H. 685, 689 (1990), it can be difficult to discern the appropriate sanction in a particular case from prior case law.
8. However, it is clear that Mr. Wolterbeek's misconduct does not fall on the low end of the spectrum, with public censure. Unlike Mr. O'Meara, Mr. Wolterbeek has a prior disciplinary history (see attached Warning in 1997, and Reprimand in 2003). Notably, however, Mr. Wolterbeek's disciplinary history post-dates his misconduct in this case and is, therefore, not as strong an aggravating factor.
9. There is one additional aggravating fact that takes Mr. Wolterbeek's case out of the realm of public censure. Mr. Wolterbeek acted with a selfish motive, see ABA Standards §9.22(b), and took advantage of his own client in that process.
10. While the Court has "ordered disbarment for attorney misconduct involving dishonesty," O'Meara's Case, 834 A.2d at 237, the Court has observed that "those cases involved additional and repeated misconduct, including the respondent's failure to cooperate with the professional conduct committee." Id.
11. Mr. Wolterbeek's case does not fall into the disbarment category because he has exhibited a "cooperative attitude toward, and has made full disclosure in," these attorney discipline proceedings. This Stipulation illustrates Mr. Wolterbeek's full cooperation, and his acceptance of responsibility for his misconduct. See ABA Standards §9.32(c).
12. Mr. Wolterbeek's case is deserving of a two-year term of suspension. See Bruzga's Case, 145 N.H. 62, 69-72 (2000) (holding one-year suspension appropriate in case where respondent made false statements and offered false affidavits to district court); Feld's Case, 149 N.H. at 28-30 (holding one-year suspension appropriate in case where respondent counseled client to present false testimony). A two-year suspension addresses Mr. Wolterbeek's deceit, the conflict of interest, and the prohibited transaction.
13. In sum, a two-year suspension is consistent with the purposes of attorney discipline as well as other New Hampshire cases.

14. Mr. Wolterbeek shall be responsible to reimburse the Professional Conduct Committee for all costs and expenses incurred in the investigation and prosecution of this matter.

#### IV. CONCLUSION

For all of the above reasons, the Professional Conduct Committee directs Disciplinary Counsel to file a Petition with the New Hampshire Supreme Court, requesting that Mark Wolterbeek be suspended from the practice of law for two years for violating the following N.H. R. Prof. Conduct Rules: 1.7(b): Conflict of Interest; Rule 1.8(a): Prohibited Transactions; Rule 3.3(a)(1): Candor to the Tribunal; Rule 8.4 (c): Conduct involving Dishonesty, Fraud, Deceit and Misrepresentation, and Rule 8.4(a): Catch-all rule. The Petition should also set forth the Committee's recommendation that this suspension be made consecutive to the sanction imposed in *In the Matter of Mark E. Wolterbeek*, LD 2003-0009.

Date:

2/10/05

By:

Margaret H. Nelson  
Margaret H. Nelson  
Chair

cc: Landya B. McCafferty, Disciplinary Counsel  
Michael Shklar, Esquire  
File