

New Hampshire Supreme Court
Professional Conduct Committee

Margaret H. Nelson, Chair
Benette Pizzimenti, Vice Chair
Toni M. Gray,* Vice Chair
David N. Cole
Thomas P. Connair
Alan J. Cronheim
Eleanor Wm. Dahar

4 Park Street, Suite 304
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Nancy R. Hacking*
Gretchen Rule Hamel
James R. Martin
David N. Page*
Stephen B. Stepanek*
* non attorney member

Holly B. Fazzino, Admin. Coordinator

Young, David A. advs. Kenneth I. Gordon #00-N-106

REPRIMAND

I. Background

This matter was originally heard by a hearing panel of the Professional Conduct Committee ("Committee") on March 20 and March 29, 2002. As a result of that hearing, the Committee filed with the New Hampshire Supreme Court a Petition for Six Month Suspension from the Practice of Law against Mr. Young.

Following a hearing before Judicial Referee George L. Manias and, subsequently, oral argument before the New Hampshire Supreme Court, the Committee and Mr. Young entered into a Stipulation. By order dated September 15, 2005, the Supreme Court remanded the matter to the Committee for further action in accordance with the Stipulation.

At a meeting on September 20, 2005, the following Committee members were recused from the matter: Alan Cronheim, David Cole, Tom Connair, Nancy Hacking and Eleanor Dahar. Member David N. Page was absent and did not vote.

II. Stipulation

The Stipulation signed by the Committee, Mr. Young and counsel (executed between August 5 and August 11, 2005) is attached to, and made part of, this Reprimand.

A. Factual Findings

The following facts, quoted in their entirety, are contained in the Judicial Referee's Report of November 19, 2004:

This matter arose out of the respondent's representation of the client from February 1998 through May 2000 in connection with the client's action against M.E.P. and Harold J. Kissell. Before retaining the respondent, the client had been represented in an action brought on his behalf against M.E.P. and Kissell in New York by New York counsel. That suit was dismissed upon jurisdictional grounds.

After learning that the respondent represented MedEd, Inc. in suit against M.E.P.

and Kissell in Connecticut arising out of the same asset purchase agreement that was at issue in the client's New York action, the client sought to retain the respondent as his attorney to sue M.E.P. and Kissell on his behalf in Connecticut. See Letter of February 3, 1998, R's Exh. 9.

At the time, the respondent was a relatively inexperienced attorney, having been admitted to the New Hampshire bar in 1996 and having spent much of his time since admission in active service in the United States Army. He was not admitted to practice in Connecticut, but was associated with attorneys who were members of the Connecticut bar.

In his February 3, 1998 letter to the respondent, the client proposed "a straight contingency fee of 33 1/3% of any recovery," and offered to pay for any "initial out-of-pocket filing fees." Id. On February 5, 1998, the respondent wrote to the client that he would incorporate into the engagement letter the 33.33% contingency fee they discussed, but that he and his firm would "additionally require an initial retainer payment of \$5,000 plus a monthly retainer of \$1,500." See Letter of February 5, 1998, P's Exh. A, R's Exh. 1.

The parties entered into a "Contingency Fee/ Retainer Fee Agreement" on February 11, 1998 (Agreement). See Agreement, P's Exh. 2, R's Exh. B. The Agreement provided in pertinent part:

Agreement is between [the respondent] and [the client],... for thirty-three and one third percent (33.3%) plus litigation costs if the litigation settles prior to trial or through a verdict at trial. [The respondent] will commence the representation of [the client's] litigation upon receipt of the initial five thousand dollars (\$5,000 USD) retainer payment, and a signed copy of this agreement.

This agreement contains the terms under which representation by the undersigned will be taken by [the respondent]. Terms that are not contained in this agreement will not be binding on the undersigned... or [the respondent].

....

2. Fees and Payment: The Firm will be compensated by receiving both a contingent fee and litigation costs, to be drawn on the retainer payments for representing the Client in its litigation against Kissell, et al., as follows:

a. Contingent Fee Payment

Thirty-three and one third percent (33.3%) plus litigation costs, of any gross sum of money (prior to any tax deductions or other deduction) will

be paid to the Firm in payment of the contingency fee, through any award or settlement between the parties, prior to trial....

Litigation costs include the following: courts costs and office expenses related to this litigation will be reimbursed by the client. Court costs typically include, for example, moneys paid for matters such as: court filing fees, service of process charges, photocopying expenses, expert witness fees, court reporter and subpoena fees. Office expenses include office travel, telephone, facsimile, secretarial, paralegal, research, postage and other expenses related to the Client's claim.

....

b. Retainer Payment

An initial payment of five thousand dollars (\$5,000 USD) to be paid prior to the Firm's commencement of representing the Client. Payments of one thousand dollars (\$1,000 USD) per month thereafter, due on the first of each proceeding month, beginning March 1, 1998.

At the conclusion of the litigation, if the litigation costs exceed the amount paid by the Client through the retainer, the Client agrees to pay the additional litigation costs to the Firm in addition to the agreed to contingent fee payment. Accordingly, if the litigation costs do not meet the amount paid by the Client through the retainer fees, the Firm agrees to either send the Client a check for the difference, or deduct this amount from the contingent fee payment.

Id.

Notably, the Agreement did not state that the retainer fees was nonrefundable or that it constituted a flat-fee for services rendered. At the hearing, the respondent conceded that the Agreement did not and should have so stated.

From February 1998 through May 2000, the client forwarded to the respondent approximately \$37,500.00 (an initial sum of \$5,000.00 and either \$1,000.00 or \$1,500.00 per month thereafter). The respondent did not open any trust account for the monies he received from the client. Nor did he deposit them into a trust account. He deposited them all into his general operating account and used them to pay the general operating expenses of this law office.

The respondent did not notify the client that the monies were deposited into the firm's general operating account and not a trust account and that they were used to fund the firm's general operating expenses. Nor did he notify the client that he never opened a trust account for the monies.

On May 3, 2000, the client terminated the respondent's representation of him. See Letter of May 3, 2000, P's Exh. 6. At that time, the client requested that the respondent provide him with "a full accounting" of the funds the client gave him "on retainer, since February, 1998 and the expenses incurred against these funds." Id.

In response to this request, the respondent forwarded a one page draft accounting sheet that showed that of the money the client forwarded him, the respondent had spent \$29,430.00 of it. See Draft Accounting, P's Exh. 7.

B. Rulings of Law

In accordance with the attached Stipulation it is found by clear and convincing evidence, that:

1. Mr. Young violated Rule 1.5 of the New Hampshire Rules of Professional Conduct, and
2. Mr. Young violated Rule 8.4(a) of the New Hampshire Rules of Professional Conduct,

by failing to include a written fee agreement Mr. Young had with his client, Sidney Auerbach, all of the essential terms and conditions of that fee agreement under circumstances where Mr. Young knew or should have known that the inclusion of all of those terms were required by the New Hampshire Rules of Professional Conduct.

III. Sanctions

In further accordance with the Stipulation, the following sanctions are imposed in this matter:

1. This Reprimand is issued based on the misconduct set forth above.
2. Mr. Young is to reimburse the Committee the sum of Twenty Thousand Dollars (\$20,000.00) for its costs and expenses incurred in this matter, as follows:
 - a. Five Thousand Dollars (\$5,000.00) to be paid within Thirty Days (30) of the date of this Reprimand; and
 - b. Fifteen Thousand Dollars (\$15,000.00), as evidenced by a Promissory Note signed by Mr. Young on August 8, 2005, with simple interest of Five Percent (5%) per annum on the unpaid balance, with payment due in full on May 1, 2006. There shall be no penalty for prepayment.

Dated: September 21, 2005

By: Margaret H. Nelson
Margaret H. Nelson, Chair

c.c. Joseph F. Daschbach, Esquire
Counsel for David A. Young, Esquire
Charles P. Bauer, Esquire
Counsel for the Committee
File

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. LD-2003-007

In the Matter of David A. Young, Esquire

STIPULATION

NOW COME David A. Young, Esquire ("Mr. Young") and the State of New Hampshire Supreme Court Committee on Professional Conduct ("PCC"), with their respective counsel, and submit the following stipulation to the Referee in reference to Supreme Court Order dated June 24, 2005:

Stipulated Facts:

Mr. Young and the PCC stipulate to the Referee's findings of fact as set forth in Referee's Findings and Recommendations dated November 19, 2004 as they relate to New Hampshire Rules of Professional Conduct, Rule 1.5 and Rule 8.4 (a).

Stipulated Legal Rulings:

Mr. Young and the PCC stipulate that the Referee may rule, by clear and convincing evidence, that

1. Mr. Young violated Rule 1.5 of the New Hampshire Rules of Professional Conduct, and
2. Mr. Young violated Rule 8.4(a) of the New Hampshire Rules of Professional Conduct,

by failing to include in a written fee agreement Mr. Young had with his client, Sidney Auerbach, all of the essential terms and conditions of that fee agreement under circumstances where Mr. Young knew or should have known that the inclusion of all of those terms were required by the New Hampshire Rules of Professional Conduct.

Stipulated Sanctions:

Mr. Young and the PCC stipulate that the Referee may recommend the following sanctions:

1. Matter be remanded to the PCC for issuance of a Letter of Reprimand to Mr. Young consistent with this Stipulation; and
2. Payment by Mr. Young to the PCC of \$20,000.00 of the costs and expenses incurred by the PCC as follows:
 - a. \$ 5,000.00 to be paid within 30 days of the date of the Letter of Reprimand; and
 - b. \$15,000.00, as evidenced by a promissory note signed by Mr. Young, with simple interest of 5% per annum on the unpaid balance, with payment due in full on May 1, 2006. No penalty for prepayment.

Respectfully submitted,

State of New Hampshire Supreme Court Committee
On Professional Conduct

Dated: August 10, 2005

By: Margaret H. Nelson
Margaret H. Nelson, Esq.
Chair, Duly Authorized

State of New Hampshire Supreme Court Committee
On Professional Conduct

By Its Attorneys,
RANSMEIER & SPELLMAN
PROFESSIONAL CORPORATION

Dated: August 11, 2005

By: Charles P. Bauer
Charles P. Bauer, Esquire (NHBA # 0208)
Lisa M. Lee (NHBA #14896)
One Capitol Street, P.O. Box 600
Concord, NH 03302-0600
Tel. (603) 228-0477

Dated: August 2, 2005

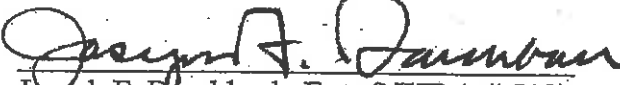
By:


David A. Young, Esq.

David A. Young, Esq.
By His Attorneys,
DASCHBACH, COOPER,
HOTCHKISS & CSATARI, PA

Dated: August 5, 2005

By:


Joseph F. Daschbach, Esq. (NHBA # 518)
8 South Park Street
P.O. Box 191
Lebanon, NH 03766
Tel. (603) 448-2211

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