

New Hampshire Supreme Court
Professional Conduct Committee

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Barbagallo, Ralph A., Jr. advs. Diane M. Lambert # 03-056

PUBLIC CENSURE

On July 18, 2006, the Professional Conduct Committee heard oral argument in the above-referenced matter, pursuant to New Hampshire Supreme Court Rule 37A (III)(d)(2)(B). James L. Kruse, Esquire, Assistant Disciplinary Counsel, appeared for the Attorney Discipline Office. Russell F. Hilliard, Esquire, appeared for the Respondent, Ralph A. Barbagallo, Jr., Esquire. The Professional Conduct Committee Panel consisted of Thomas P. Connair, Esquire, Alan J. Cronheim, Esquire, Gerald A. Daley, Richard H. Darling, James R. Martin, Esquire, David N. Page and Benette Pizzimenti, Esquire, Vice-Chair. Attorney Pizzimenti served as Chair of the Panel and as Reporter. Margaret H. Nelson, Esquire, and Toni M. Gray were recused. Eleanor Wm. Dahar, Esquire, David N. Cole, Esquire, and Gretchen Rule Hamel, Esquire, were absent.

The Professional Conduct Committee thoroughly reviewed the entire record in this matter, including the Hearing Panel Report and memoranda submitted by counsel, and makes the factual findings and rulings as detailed below.

I. FACTUAL FINDINGS

- A. The Professional Conduct Committee determined that the record supports the following findings of the Hearing Panel, as stipulated by Assistant Disciplinary Counsel, James L. Kruse and Respondent, Ralph A. Barbagallo, Jr., by clear and convincing evidence:
1. Respondent, Ralph A. Barbagallo, Jr., is an attorney licensed to practice law in New Hampshire. He was admitted to practice in New Hampshire in 1988. He was admitted to practice in Massachusetts in 1968. At all times material to this proceeding, Mr.

Barbagallo operated the Law of Office of Ralph A. Barbagallo, Jr., at 231 Sutton Street, North Andover, Massachusetts, and at 68 Stiles Road, Salem, New Hampshire.

2. In a sworn complaint dated May 19, 2003, and in subsequent letters, Complainant, Diane Lambert, on behalf of her daughter, Jillian, asserted allegations of professional misconduct against Mr. Barbagallo.
3. Mr. Barbagallo tendered a sworn response dated July 8, 2003.
4. On December 18, 2001, Complainant and Jillian retained Mr. Barbagallo to represent Jillian in connection with a claim for injuries suffered in a December 14, 2001, automobile accident. Complainant and Jillian executed a contingency fee agreement with Mr. Barbagallo on December 18, 2001.
5. Later in December, 2001, Mr. Barbagallo was also retained to represent Jillian's passenger, Erin Hardy, in connection with the same accident.
6. Mr. Barbagallo met with both clients separately and disclosed that he was representing each of them in pursuit of their respective personal injury claims against Linda O'Neil.
7. Under the facts of the case as initially presented to Mr. Barbagallo, Mr. Barbagallo determined there was no basis for disputing Ms. O'Neil's liability. Further, there was no allegation of fault on the part of Jillian. Accordingly, Mr. Barbagallo perceived no conflict of interest, and thus no need to seek Complainant's or Jillian's particular consent to proceed with representation under the circumstances.
8. Jillian and Erin were both injured in the accident. Erin's injuries were significantly more serious than Jillian's. Mr. Barbagallo undertook initially to investigate and prepare both claims.
9. With Jillian's and Complainant's assistance, Mr. Barbagallo assembled medical files and other information regarding Jillian's injuries. He anticipated preparing a settlement package relative to Jillian's claim for Ms. O'Neil's insurance carrier, Amica Insurance Company. In August, 2002, Mr. Barbagallo drafted a proposed demand letter to Amica and corresponded with his client about the proposal.

10. By letter dated January 31, 2002, Amica responded to Mr. Barbagallo's requests for disclosure of insurance limits. The carrier advised Ms. O'Neil, had "single limit" coverage, allowing gross recovery in the amount of \$300,000.
11. Mr. Barbagallo had not previously encountered a "single limit" policy and had assumed that coverage limits would be as to each individual plaintiff.
12. Mr. Barbagallo recognized that, with the single limit coverage, and without any other applicable insurance coverage, his two clients would be competing for a share of a single sum of money. Accordingly, Mr. Barbagallo perceived a conflict of interest.
13. Mr. Barbagallo asked Amica to supply an affidavit confirming that there was no additional liability insurance coverage in this matter. Amica responded with such an affidavit with its counsel's letter of April 22, 2003.
14. Mr. Barbagallo was unable to find and secure additional insurance coverage for his clients, so he decided to withdraw as counsel for Jillian. Representation of both Jillian and Erin had also become more difficult in view of a falling-out between the two friends.
15. On or about April 3, 2003, Mr. Barbagallo met with Complainant and Jillian to advise of his withdrawal and to assist them in hiring new counsel. Mr. Barbagallo told Complainant and that he was going to continue representing Erin. Complainant and Jillian were very upset with Mr. Barbagallo's decision. Mr. Barbagallo did not seek Jillian's or Complainant's consent to continue representing Erin.
16. On April 7, 2003, Mr. Barbagallo returned the file materials assembled on behalf of Jillian to Complainant. He did not ask Complainant or Jillian to pay any fees for his services.
17. Complainant and Jillian later retained Robert H. Minasian of Lawrence, Massachusetts, to represent them in connection with Jillian's claim. Without at any time obtaining Jillian's or Complainant's consent to do so, Mr. Barbagallo continued to represent Erin Hardy.

18. In August and September, 2003, Mr. Minasian and Mr. Barbagallo exchanged correspondence regarding possible settlement of Jillian's and Erin's claims.
19. In September, 2003, Mr. Barbagallo filed a Declaratory Judgment action against Amica in an effort to obtain additional coverage under Ms. O'Neil's homeowner's policy.
20. Following communications with Amica, Mr. Minasian and Mr. Barbagallo exchanged additional correspondence in April and May, 2004, about settlement of the claims.
21. Erin's and Jillian's claims were both settled with Amica. Both clients were satisfied with their settlements.

B. The Professional Conduct Committee determined that the record supports the following factual findings of the Hearing Panel by clear and convincing evidence:

22. At the time Mr. Barbagallo undertook representation of Erin Hardy, he had already established an attorney-client relationship with Jillian Lambert. He was aware from the initiation of his representation of Ms. Hardy that she had suffered significant injuries in the accident.
23. Mr. Barbagallo did not promptly notify Mrs. Lambert and Jillian about the January 31, 2002, letter from Amica regarding insurance coverage. Further, Attorney Barbagallo did not promptly inform his clients about the problems that posed with his representation of both parties.
24. Mr. Barbagallo did not seek any waiver from the client that would allow him to continue pursuing additional coverage on behalf of both parties after receiving the January 31, 2002, letter from Amica Insurance.
25. Mr. Barbagallo continued to represent both Jillian Lambert and Erin Hardy and to communicate for several months with the insurance adjuster regarding their claims.
26. Mr. Barbagallo did not notify Mrs. Lambert and Jillian about this ongoing conflict until he met with them on or about April 3, 2003.

27. Mr. Barbagallo was in possession of knowledge and information about Jillian Lambert's case when he began negotiating on behalf of Erin Hardy.
28. He never sought a waiver from Jillian Lambert that would allow him to continue representation of Erin Hardy whose interests, at that time, were directly adverse to Ms. Lambert's.

II. RULINGS OF LAW

The above-listed facts, having been found by clear and convincing evidence, the Professional Conduct Committee concludes that there is clear and convincing evidence that Ralph A. Barbagallo, Jr. has violated the following Rules of Professional Conduct:

Rule 1.7: Conflict of Interest

1. In December 2001, Mr. Barbagallo undertook to represent Jillian Lambert and Erin Hardy in connection with their claims arising out of the same automobile accident. Both clients sought recovery from a single, insured defendant.
2. On or shortly after January 31, 2002, Mr. Barbagallo obtained information from the defendant's insurance company regarding a "single limit" insurance policy. Thereafter, and under the circumstances as he knew them, Mr. Barbagallo was representing adverse parties, despite his ongoing efforts to eliminate the conflict by finding additional coverage.
3. Mr. Barbagallo operated under this conflict of interest until April 3, 2003, when he withdrew from representing Jillian Lambert.
4. Mr. Barbagallo did not undertake to advise his clients or consult with his clients about the aforementioned conflict in a timely fashion; he did not provide them with an explanation of the implications of the ongoing common representation, as well as the advantages and risks involved; and he did not obtain their knowing consent.

5. Mr. Barbagallo could not reasonably have believed under the circumstances as he knew them from January 2002 through April 2003, that representation of one client would not be adversely affected by representation of the other, or that representation of one client would not be materially limited by his responsibilities to the other.

Rule 1.9(a): Conflict of Interest, Former Client

1. Mr. Barbagallo represented Erin Hardy in connection with personal injury claims arising out of an automobile accident with respect to which he had also formerly represented Jillian Lambert.
2. Erin Hardy's interests in connection with this matter were materially adverse to the interests of Mr. Barbagallo's former client, Jillian Lambert.
3. Mr. Barbagallo did not obtain Jillian Lambert or Mrs. Lambert's knowing consent to continue with his representation of Erin Hardy nor did Mr. Barbagallo consult with Jillian Lambert or Mrs. Lambert to explain the consequences of such continued representation.

Rule 8.4(a): Misconduct

Because there exists clear and convincing evidence that Attorney Barbagallo violated the above rules, there is necessarily clear and convincing evidence of a violation of Rule 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 Public Censure. 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 Professional Conduct Committee considered the analysis of the sanction in the Hearing Panel Report, the *Memorandum on Sanction: Public Censure* submitted by the Attorney Disciplinary Office, and *Respondent's Memorandum on Sanctions*, submitted by Attorney Hilliard. The Hearing Panel was split on the recommendation for sanction with three favoring a Public Censure and two favoring a suspension. The Attorney Discipline Office recommended at oral argument that a Public Censure be imposed.

As articulated in the Hearing Panel Report, the ABA Standards for Imposing Lawyer Sanctions suggests, in part, the following regarding the failure to avoid conflicts of interest:

- Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. (4.32)
- Reprimand ("Public Censure") is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interest, or whether the representation will adversely affect another client, and causes injury or potential injury to a client. (4.33)

The Professional Conduct Committee considered the following *mitigating* factors:

- I. Length of time the Respondent has practiced competently and without incident;
- II. Apparent lack of harm to the clients; and
- III. Taking action at some point to eliminate an obvious conflict.

The Professional Conduct Committee considered the following *aggravating* factors:

- I. Length of time the Respondent maintained an attorney-client relationship with both parties despite the presence of an obvious conflict;

- II. Failure to communicate with the client about the conflict when it first materialized, and to fully inform the client about potential consequences and the client's rights in the situation;
- III. Insensitivity to the client by failing to give an adequate explanation to the client as to why he was going to withdraw from representation in her case;
- IV. Lack of understanding of the Rules of Professional Conduct and what they require, despite the extent of his experience in the practice of law;
- V. Appearance of self-interest, and
- VI. Failure to acknowledge the wrongful nature of his conduct.

Assistant Disciplinary Counsel weighed in on the side of a Public Censure. The Professional Conduct Committee agrees. As Attorney Kruse points out with respect to Rule 1.7 violation, "(i)f not knowing, he (Mr. Barbagallo) was certainly negligent in his failure (a) to recognize the need to deal with the conflict promptly before obtaining further information from the carrier, and (b) to recognize the potential harm to his client(s) caused by his silence and his continued work on the case." With respect to the Rule 1.9 violation, the evidence shows that Mr. Barbagallo was negligent in his failure to recognize that by not extricating himself entirely from the matter and retaining the Hardy case, he was pursuing interests of Ms. Hardy that were materially adverse to those of his former client, Ms. Lambert.

On balance, the Professional Conduct Committee adopts the analysis of the Attorney Discipline Office that "given the number of years Mr. Barbagallo has practiced without a disciplinary record, it may be that Mr. Barbagallo's conduct is attributable, at least in some measure, to bad habits and a failure to learn, understand, and appreciate modern standards of ethics that must be strictly applied in any practice." The Committee also considered the Court's reasoning in the imposition of a Public Censure in *Shillen's Case*, 149 N.H. 132 (2003) which involved similar rules violations for conflict of interest.

IV. CONCLUSION

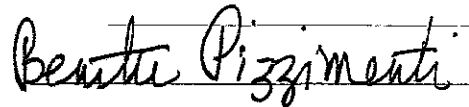
For the above reasons, the Professional Conduct Committee voted to issue a Public Censure to Mr. Barbagallo for violating N.H. Prof. Conduct Rules 1.7, 1.9(a) and 8.4(a). In addition, Mr. Barbagallo is required to complete twelve Continuing Legal Education Credits in

Ethics within one year from the date of this Order with at least four of these credits being "live." This requirement is in addition to the standard CLE requirements. Mr. Barbagallo is assessed all costs associated with the investigation and prosecution of this matter.

V. RIGHT TO APPEAL

Pursuant to Supreme Court Rule 37(A)(III)(d)(2)(D)(4)(A), Ralph A. Barbagallo, Jr. has the right to appeal to the New Hampshire Supreme Court. See also Supreme Court Rule 37(3)(c).

Date: August 1, 2006



Benette Pizzimenti
Chair

Distribution:

James L. Kruse, Assistant Disciplinary Counsel
Russell F. Hilliard, Esquire
Diane M. Lambert
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