

New Hampshire Supreme Court
Professional Conduct Committee

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Clauson, K. William advs. Attorney Discipline Office # 03-099

PUBLIC CENSURE with CONDITIONS

On September 18, 2007, this matter was deliberated by the Professional Conduct Committee. Members present included: Margaret H. Nelson, Chair, Toni M. Gray, Reporter, Alan J. Cronheim, Richard H. Darling, Gretchen Rule Hamel, James R. Martin and Thomas P. Connair. David N. Cole and David N. Page were recused, Gerald A. Daley was absent, James J. Tenn, Jr. abstained.

The Professional Conduct Committee voted to exclude testimony of Professor Mitchell Simon from its deliberations.

I. FACTUAL FINDINGS

The Professional Conduct Committee makes the following Findings of Fact by clear and convincing evidence:

1. Respondent K. William Clauson is licensed to practice law in New Hampshire. He was admitted to practice in this state in 1971.
2. Mr. Clauson's current place of business is the Law Offices of Clauson Atwood & Spaneas at Buck Road in Hanover, New Hampshire. At other times material to this proceeding, Mr. Clauson practiced alone and as a partner in the Hanover firms of Clauson, Struckhoff & Kelly and Clauson, Smith & Whelan.
3. This matter was initiated by referral under N.H. R. Prof. Conduct 8.3(a). The referring New Hampshire attorney is David N. Cole of Hanover, N.H. By letter of November 24, 2003, including multiple attachments, Mr. Cole alleged that Mr. Clauson had engaged in

professional misconduct by operating under a conflict of interest in violation of the New Hampshire Rules of Professional Conduct.

4. Mr. Clauson responded to the complaint through counsel by letter of January 6, 2004.
5. The conflict issue arose in the context of a dispute between Dr. James Kowles and his former employer, Family Health Center, P.A. (hereinafter referred to as "FHC"), a medical practice in Lebanon, New Hampshire. A related dispute involved Dr. Kowles' interest in the Mascoma River Medical Group, a real estate partnership. These disputes became the subject of a Petition in Equity filed by Mr. Clauson on August 20, 2003, on behalf of Dr. Kowles (James Kowles v. Ernst Oidtman, Carrie Webber, and Family Health Center, P.A., Grafton County Superior Court Docket No. 03-E-0203).
6. From 1978 to 1995, Mr. Clauson and his firm represented FHC (or the medical partnership that existed prior to incorporation) in connection with various business matters, including the contractual relationship it had with Dr. Kowles.

1978: Mr. Clauson Began Serving as Corporate Counsel

7. In 1978, Mr. Clauson was retained to serve as counsel to the original medical partnership of Drs. Hugh Bower and Dennis McCullough, operating at the time under a 1976 Partnership Agreement. Dr. Kowles had joined the practice in 1977 as an employee of the partnership.
8. In December, 1978, Mr. Clauson first analyzed various business matters and alternatives pertaining to the medical practice, including the possibility of incorporation and terms under which Dr. Kowles might buy in to the business as a one-third owner. Mr. Clauson then handled the incorporation of FHC, which was completed in January 1979.

1979-80: Mr. Clauson Prepared Original Employment and Stock Redemption Agreements for FHC

9. In January 1979, Mr. Clauson conferred with FHC about a proposed shareholder's agreement and, in the following September, drafted a proposed employment agreement for each physician owner to sign, as well a buy-out agreement.

10. In his letter of October 15, 1979, Mr. Clauson provided FHC with further legal analysis regarding the new professional association, including capitalization, transfer of assets, and sale and distribution of stock. Mr. Clauson referenced his work on the initial shareholder's agreement, which was based in part on the existing partnership agreement and which Mr. Clauson expected to revise in 1980 to include Dr. Kowles. Mr. Clauson also enclosed the proposed draft employment agreement he had prepared (also based on the prior partnership agreement), governing the employment and compensation relationship of all three doctors as employees of FHC.
11. In connection with the foregoing analysis and plan, Mr. Clauson collaborated with FHC's business management consultant, W.J. Godfrey ("Zeke") Gourley. Mr. Clauson's conversations with Mr. Gourley included discussion of a formula for valuation of FHC stock, including reference to "cash basis" and "modified accrual basis."
12. In July, 1980, Mr. Clauson consulted further with FHC in anticipation of the sale of stock to a fourth physician, Dr. Ernst Oidtman. Mr. Clauson addressed the question of how the buy-in would be accomplished and suggested reviewing the transaction with Mr. Gourley.
13. In September 1980, Mr. Clauson drafted a proposed shareholder buy-out agreement and forwarded it to FHC for its review. He also recommended that his client consider a lease and right of first refusal in connection with the practice's property, as well as employment agreements for each of the doctors.
14. Mr. Clauson drafted the right of first refusal and employment agreements.
15. The four physician shareholders of FHC, including Dr. Kowles, executed a Stock Redemption Agreement dated February 1, 1980 (hereinafter referred to as the "1980 Stock Redemption Agreement").
16. The 1980 Stock Redemption Agreement prepared and/or reviewed by Mr. Clauson in collaboration with Mr. Gourley provided for the equal ownership of FHC stock among the participating physician shareholders, addressed conditions under which the shareholders' stock would be redeemed and sold, and provided that FHC stock would be valued on a "modified accrual basis."

17. On or about December 2, 1980, each of the doctors, including Dr. Kowles, also executed an employment agreement prepared and/or reviewed by Mr. Clauson in collaboration with Mr. Gourley (hereinafter referred to as the "1980 Employment Agreement"). The 1980 Employment Agreement set forth the duties and responsibilities of FHC and each of the employee physicians, including provisions relating to compensation and distribution of profits while employed, resolution of disputes through arbitration, and provisions dealing with the departure or termination of any of the physicians, as well as limitations on the practice of any departing physician.
18. Prior to March 27, 1981, Mr. Clauson reviewed proposed revisions to the stock redemption agreement prepared by the client and/or Mr. Gourley.
19. On March 27, 1981, Mr. Clauson wrote to FHC, enclosing original stock certificates for each of the shareholders, including Dr. Kowles. He confirmed he had reviewed the proposed changes in the stock redemption agreement and that he agreed with all of them. Mr. Clauson also made recommendations regarding shareholder and directors' meetings and records thereof.
20. Mr. Clauson and his firm served for several years thereafter as custodian of the records and as corporate counsel to FHC.

1983: Dr. Fraser Joins the Practice

21. In 1983, Dr. Linda Fraser "bought in" to the practice and each of the doctors signed updated, revised employment and stock redemption agreements. These agreements, hereinafter referred to respectively as the "1983 Employment Agreement" and the "1983 Stock Redemption Agreement," contained the same basic features governing the contractual relationship between FHC and Dr. Kowles that had been in effect from the inception of that relationship.
22. In or about May 1983, Mr. Clauson assigned his then-associate, Daniel G. Smith, Esq., to handle the transaction associated with the arrival of Dr. Fraser. To the extent that Mr. Smith was thereafter involved in drafting, preparing, and/or reviewing any documents associated with Dr. Fraser's arrival, including the 1983 Employment and 1983 Stock

Redemption Agreements, he did so as an associate in the Clauson firm. He also performed such services under the general supervision of, and occasionally in consultation with, Mr. Clauson.

23. In July and August, 1983, Mr. Smith prepared documents and provided legal counsel to FHC regarding the stock transfers to Dr. Fraser. He also reviewed the stock redemption agreement and conferred with Mr. Gourley.

1988: Real Estate Partnership Agreement

24. On March 23, 1988, Drs. Oidtman, Kowles, and Glazer executed a real estate partnership agreement. The "Mascoma River Medical Group" was formed to purchase, hold, and lease real property, more particularly the office premises of FHC. The agreement, hereinafter referred to as the "Mascoma Real Estate Partnership Agreement," was prepared by Attorney Lawrence Kelly at Daschbach, Kelly, and Cooper in Lebanon.

1995: FHC Terminates the Clauson Firm

25. In or about 1995, the Clauson firm ceased representing FHC. Mr. Smith left the firm, opened his own practice, and FHC decided to retain Mr. Smith as corporate counsel.

2001: Dr. Webber Joins the Practice

26. In December, 2001, FHC consulted with Mr. Bridgman about the buy-in of a new physician, Dr. Carrie Webber.
27. Consistent with Mr. Bridgman's recommendations, Mr. Smith, now with his own law firm, prepared updated, revised contract documents which were executed by Drs. Kowles, Oidtman and Webber in January 2002. The employment agreement (hereinafter referred to as the "2002 Employment Agreement") and the renamed stock redemption agreement (hereinafter referred to as the "2002 Shareholders Agreement") signed by Dr. Kowles served to preserve and extend the original contractual relationship between FHC

and Dr. Kowles.

2002-03: Dr. Kowles Dispute

28. In the latter part of 2002, Dr. Kowles notified FHC of his desire to reduce his practice to part-time. FHC agreed temporarily to pay Dr. Kowles as a part-time employee. In anticipation of Dr. Kowles withdrawal and/or termination, FHC consulted with Mr. Bridgman regarding financial questions arising under the contracts.
29. In letters dated January 16, 2003, to FHC, Mr. Bridgman provided analysis and calculations under the terms of the 2002 Employment Agreement regarding longevity pay, severance pay, and Dr. Kowles' remaining share of Dr. Webber's accounts receivable "buy-in." Mr. Bridgman also calculated the value of Dr. Kowles' shares of FHC stock under the 2002 Shareholders' Agreement.
30. On January 20, 2003, FHC issued a notice announcing that Dr. Kowles had reduced his work hours and that Dr. Kowles had requested that his patients select a new doctor of record.
31. In his letter of February 3, 2003, Dr. Kowles indicated he accepted Mr. Bridgman's calculations. He urged the remaining partners to accommodate his desire to continue practicing and to agree to resolve any issues under the existing 2002 Employment and 2002 Shareholders' Agreements in accordance with Mr. Bridgman's analysis.
32. At approximately the same time in February, 2003, FHC started making severance and longevity payments to Dr. Kowles, as contemplated under the 2002 Employment Agreement.
33. Dr. Kowles retained the office of R. Peter Decato, Esq. to represent his interests in connection with the change in the employment relationship with FHC. FHC retained Mr. Smith.
34. On March 3, 2003, FHC notified Dr. Kowles it was unwilling to negotiate a part-time employment contract and cautioned Dr. Kowles that the restrictive covenant contained in the underlying 2002 Employment Agreement remained in force until December 31, 2004. FHC further advised that it would inform Dr. Kowles' patients of his change in practice

and warned Dr. Kowles that “as per your employment agreement you are not allowed to discuss the dissolution of the agreement with any patient.”

35. On March 5 and 6, 2003, Mr. Bridgman provided additional and revised calculations. With respect to Dr. Kowles’ anticipated share of Dr. Webber’s accounts receivable buy-in, Mr. Bridgman observed that, because Dr. Kowles was no longer an owner, he should not receive a full share.

April, 2003: Mr. Clauson Retained By Dr. Kowles To Proceed Against FHC

36. On April 1, 2003, Mr. Clauson wrote to Mr. Smith to announce his involvement as counsel for Dr. Kowles and to identify areas of disagreement regarding the proposed buy-out of Dr. Kowles’ interests in the practice and his rights under the 2002 Shareholders Agreement and the 2002 Employment Agreement.
37. Dr. Kowles’ interests in this regard were materially adverse to those of FHC, Mr. Clauson’s former client.
38. FHC was never asked, nor did it consent to Mr. Clauson’s representation of Dr. Kowles in this matter.
39. The dispute between Dr. Kowles and FHC, concerning which Mr. Clauson entered his appearance on behalf of Dr. Kowles, involved a contractual relationship that had existed between the two parties at least since 1980, and a relationship in which Mr. Clauson and his firm were involved as counsel to FHC for approximately 15 years.
40. The Kowles dispute with FHC was a substantially similar matter to that which Mr. Clauson had previously devoted his professional time on behalf of FHC.
41. Contract issues on which the subject dispute focused also bore a material resemblance to contract issues concerning which the Clauson firm had represented FHC in the Glazer matter.
42. Mr. Clauson did not research his records to determine if there might be a conflict of interest associated with his representation of Dr. Kowles against FHC.
43. When Mr. Clauson first entered the case on behalf of Dr. Kowles, Dr. Kowles recalled that Mr. Clauson had formerly represented FHC.

44. By letter of April 10, 2003, Mr. Smith reminded Mr. Clauson that he and Mr. Smith, while partners in the same law firm, had represented FHC for many years until 1995, and that Mr. Clauson had been “personally involved in drafting the original [1980] Stock Redemption and [1980] Employment Agreement[s] which form the core of current agreements between the physicians.” Mr. Smith asserted that Mr. Clauson’s representation of Dr. Kowles in the present dispute with FHC represented a conflict of interest under N.H. R. Prof. Conduct 1.9, and that Mr. Clauson should withdraw.
45. Mr. Clauson did not research his records to determine if there was a conflict as alleged. Rather, on April 11, 2003, Mr. Clauson replied to Mr. Smith on the conflict issue, claiming as follows: “I do not recall ever representing the Family Health Center.” He further alleged that Dr. Kowles had thought Mr. Smith’s work on agreements for the medical practice in the past was done on Dr. Kowles’ behalf and that it was improper for Mr. Smith to represent FHC against Dr. Kowles.
46. At no time during Mr. Smith’s representation of FHC, with particular regard to preparation of employment and shareholders’ agreements, did Dr. Kowles think that Mr. Smith was representing the personal interests of Dr. Kowles.
47. Mr. Clauson did not withdraw and persisted with the demands and negotiations on behalf of Dr. Kowles as outlined herein.
48. Among other things, Mr. Clauson asserted the following claims on behalf of Dr. Kowles in letters of April 1 and May 1, 2003:
 - a. FHC had issued notices of Dr. Kowles’ departure from the practice in violation of the 2002 Employment Agreement, requiring the parties “to notify the parties in such manner and form as may be agreed upon”;
 - b. Pursuant to an alleged “Prior Agreement as to Accounts Receivable,” so-called by Mr. Clauson, Dr. Kowles was entitled to a full one-third share of Dr. Webber’s accounts receivable buy-in, as earlier calculated by Mr. Bridgman in his letter of January 16, 2003;
 - c. Mr. Bridgman had not properly calculated longevity pay to which Dr. Kowles was entitled under the 2002 Employment Agreement;

- d. Because Dr. Kowles was fired, the covenant not to compete provision of the 2002 Employment Agreement was unenforceable;
 - e. Mr. Bridgman had not properly calculated a redemption price for Dr. Kowles' stock under the 2002 Shareholders' Agreement; and
 - f. Dr. Kowles had not been fairly compensated for part-time work done in 2003.
49. Among other issues in the 2003 contract dispute, Dr. Kowles was concerned that FHC was not properly applying principals originally designed by Mr. Gourley regarding valuation of stock in FHC. At no time during Mr. Smith's representation of FHC, with particular regard to preparation of employment and shareholders' agreements, did Dr. Kowles think that Mr. Smith was representing the personal interests of Dr. Kowles.
50. Mr. Clauson rejected Mr. Smith's proposal that the parties' differences under the shareholders' agreement be resolved through arbitration, on grounds that the shareholders' agreement did not provide for arbitration.
51. In the ensuing months, counsel exchanged correspondence on the various issues. However, they were unable to reach an accord.
52. On August 11, 2003, Mr. Cole notified Mr. Clauson that he would be representing FHC in connection with the pending dispute with Dr. Kowles. Mr. Cole also advised that he had instructed his client to cease making any severance and longevity payments directly to Dr. Kowles, and to make such payments into a separate account pending resolution of the parties' differences.
53. By copy of his letter of September 10, 2003, to Dr. Kowles, Mr. Clauson notified FHC that, by discontinuing severance and longevity payments to his client, FHC was in breach of its contract with Dr. Kowles and that, accordingly, the restrictive covenant contained in that agreement was discharged and unenforceable. Mr. Clauson advised Dr. Kowles that he was free to compete.
54. On August 20, 2003, Mr. Clauson filed the above-referenced Petition in Equity on behalf of Dr. Kowles against FHC and the other physicians, asserting claims under various agreements.
55. Mr. Clauson sought an order rescinding the restrictive covenant contained in the 2002 Employment Agreement and requiring FHC to resume severance and longevity payments

due Dr. Kowles under that agreement. He also sought payment under the so-called "Prior Agreement as to Accounts Receivable," an alleged oral agreement pertaining to distribution of shares of Dr. Webber's buy-in.

56. Under the 2002 Shareholders' Agreement, Mr. Clauson claimed that FHC had failed to properly account for and pay the redemption value of his client's stock.
57. With respect to the real estate, Mr. Clauson took the position that, because the other partners had not undertaken to buy out Dr. Kowles in a timely fashion after he was terminated, liquidation was required under the terms of the Mascoma Real Estate Partnership Agreement.
58. On behalf of all of the respondents in the equity action, Mr. Cole filed a Motion to Disqualify Plaintiff's Counsel (Mr. Clauson) because of a conflict of interest under N.H. R. Prof. Conduct 1.9.
59. Mr. Clauson filed Plaintiff's Response to Motion to Disqualify, claiming in part that it was a tactical move and that, until he read the exhibits filed in support of the motion, he had no recollection or knowledge of the matters concerning which he or his former partner provided counsel to FHC.
60. On October 13, 2003, the Grafton County Superior Court granted the motion to disqualify Mr. Clauson. It found that FHC was a former client and that Mr. Clauson owed the client a duty of loyalty which prevented him from "attacking, or interpreting, work [he] performed, or supervised" The court also found that "the current dispute between these parties is a substantially similar matter to that which Attorney Clauson devoted his time on behalf of the present respondents."
61. The pending matter was transferred to successor counsel for Dr. Kowles and the parties executed a settlement agreement on April 15, 2004.

II. RULINGS OF LAW

Rule 1.9: Conflict of Interest: Former Client

62. During the approximate period 1978 to 1995, Mr. Clauson and his firm had a valid attorney-client relationship with FHC.
63. The aforesaid attorney-client relationship included matters having to do with the contractual relationship between FHC and the various doctors, as shareholders and employees, entering, participating in, and leaving the medical practice.
64. Mr. Clauson and his firm represented FHC at the inception of its contractual relationship with Dr. Kowles. The firm continued representing FHC for approximately 15 years thereafter in connection with such contractual relationship.
65. Mr. Clauson and his firm owed FHC a duty of loyalty in connection with matters relating to the contractual relationship between FHC and Dr. Kowles.
66. The dispute between Dr. Kowles and FHC was substantially related to the aforesaid contractual relationship.
67. Dr. Kowles' interests in connection with the aforesaid dispute were materially adverse to the interests of FHC.
68. Mr. Clauson undertook to represent Dr. Kowles in the aforesaid dispute without the consent of FHC.
69. Mr. Clauson's representation of Dr. Kowles in his dispute with FHC involved analysis and interpretation of documents and agreements relating to the aforesaid contractual relationship.
70. In the case of Sullivan County Regional Refuse Disposal District v. Town of Acworth, 141 NH 479 (1996), the New Hampshire Supreme Court established a four-prong test to determine conflict of interest. They are:
 - 1) The existence of a valid attorney-client relationship;
 - 2) The interests of the former and present client are materially adverse; and

- 3) That the former client has not consented to the new representation.
- 4) The current matter and the former matter are the same or substantially related.

Given the facts enumerated above, the Professional Conduct Committee found the four-prong test had been satisfied and thus finds by clear and convincing evidence that Mr. Clauson violated NH R. Prof. Conduct 1.9(a) thereby also violating 8.4(a).

III. SANCTION

In determining an appropriate sanction, the Committee considered the American Bar Association Standards for Imposing Lawyer Sanctions (1992), section 4.3.

The Committee further considered aggravating and mitigating factors see Coffey's Case, 152 N.H. at 513. The mitigating factor was Mr. Clauson's good faith belief that he had not violated the Rules, as confirmed by Grafton County Superior Court (October 13, 2003). Aggravating factors included: harm to a former client in terms of expense and delay; that the conflict was brought to his attention and not addressed; that Mr. Clauson is an experienced attorney who has been in practice for many years, and that he received a prior warning regarding Rule 1.9 (Docket No. 02-092, January 21, 2005).

The Committee found that the appropriate sanction in this matter is a Public Censure with Conditions. Mr. Clauson must take and submit supporting documentation of passage of the Multi-state Professional Responsibility Exam within one year of this Order. If Mr. Clauson is unable to pass the examination, the matter shall be referred back to the Committee for further proceedings.

IV. COSTS

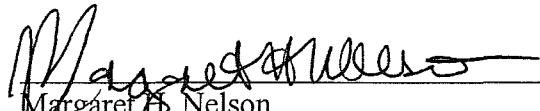
The Professional Conduct Committee orders Mr. Clauson to pay the expenses incurred by

the Committee in the investigation and prosecution of this matter.

V. CONCLUSION

For the above reasons, the Professional Conduct Committee issues a Public Censure with conditions to K. William Clauson for violating N.H. Prof. Conduct Rules 1.9(a) and 8.4(a).

October 23, 2007


Margaret Nelson
Chair

Distribution:

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