

New Hampshire Supreme Court
Professional Conduct Committee

Margaret H. Nelson, Chair
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Toni M. Gray,* Vice Chair
Ellen L. Arnold
David N. Cole
Thomas P. Connair
Alan J. Cronheim

4 Chenell Drive, Suite 102
Concord, New Hampshire 03301
603-224-5828 ♦ Fax 228-9511

Gerald A. Daley*
Richard H. Darling*
Gretchen Rule Hamel
James R. Martin
David N. Page*
* non attorney member
Holly B. Fazzino, Admin. Coordinator

Daly, John V. advs. John Leggett #04-041

PUBLIC CENSURE

On March 20, 2007, the Professional Conduct Committee heard oral arguments in the above-captioned matter on a Stipulation of Facts, Disciplinary Rules Violated and Sanction proposed by John V. Daly, Esquire, Stephen L. Tober, Esquire, counsel for the Respondent, and James L. Kruse, Assistant Disciplinary Counsel. On May 15, 2007, following deliberations, the Professional Conduct Committee voted to accept the proposed Stipulation of Facts, Disciplinary Rules Violated and Sanction. Members present were Margaret H. Nelson, Chair, Benette Pizzimenti, Vice Chair, Toni M. Gray, Vice Chair, Thomas P. Connair, Reporter, David N. Page, Alan J. Cronheim, David N. Cole, Gerald A. Daly, Richard H. Darling and Gretchen Rule Hamel. Ellen L. Arnold and James R. Martin were absent.

I. FACTUAL FINDINGS

The Professional Conduct Committee has determined that the record supports the following Findings of Fact by clear and convincing evidence:

1. In a sworn letter of complaint dated February 13, 2004, John H. Leggett, President of IDM Software, Inc., of Portsmouth, New Hampshire, (hereinafter referred to as "IDM") asserted allegations of professional misconduct against the Respondent, John V. Daly ("Mr. Daly"). Mr. Leggett submitted additional information regarding the complaint in a letter dated September 13, 2004.
2. Mr. Daly is an attorney licensed to practice law in New Hampshire. Mr. Daly was admitted to practice in 1980. At all times material to this proceeding, Mr. Daly was practicing law as an attorney in the firm of Sanders & McDermott, P.L.L.C., in Hampton, New Hampshire. Mr. Daly was most recently employed by the law firm of Pierce Atwood, L.L.P., of Portsmouth, New Hampshire. Mr. Daly is being represented in this matter by Stephen L. Tober, Esquire, Tober Law Offices of Portsmouth, New Hampshire.

3. Mr. Daly responded to the subject complaint in his letter dated August 23, 2004.
4. In January 2000, Mr. Daly and the law firm of Sanders & McDermott were hired to assist in the organization and capitalization of IDM, to include securities offerings. Patricia M. Weathersby, Esquire, then an associate with Mr. Daly's law firm who had experience in securities law, was to assist Mr. Daly in the legal work performed for IDM. Mr. Daly was the head of his firm's corporate department at the time.
5. Mr. Daly and his law firm prepared Articles of Incorporation for IDM and filed them with the New Hampshire Secretary of State on February 2, 2000.
6. In a memorandum to Mr. Daly dated February 9, 2000, Ms. Weathersby outlined the securities registration issues associated with IDM's plan to raise a large amount of capital. Anticipating that prospective investors would come from New Hampshire, New York, Massachusetts, and Rhode Island, Ms. Weathersby analyzed securities registration requirements (and exemptions there from) in each of those states and under applicable federal law.
7. In the aforementioned memorandum to Mr. Daly, Ms. Weathersby recommended a limited initial offering, to be followed later by more substantial financing efforts. With particular regard to New Hampshire, Ms. Weathersby determined that, pursuant to RSA 421-B:17(II)(k), as a newly formed corporation, IDM would qualify for an exemption from certain securities registration requirements. She also found that most states and the federal government limited the "simpler" exemptions to an offering involving up to \$1,000,000 in sales. Accordingly, IDM's initial offering would qualify for an exemption if, among other conditions, the sale was not advertised, the total number of investors did not exceed ten non-institutional investors, proceeds were limited to the \$600,000 anticipated by IDM for this first round of financing, and sales were completed within 60 days of incorporation. An addendum to the Articles of Incorporation was also required to reflect that the RSA 421-B:17(II)(k) exemption was being utilized.
8. Mr. Daly and Ms. Weathersby did not supply IDM with a copy of Ms. Weathersby's February 9, 2000, memorandum, but IDM was advised that its planned offering would qualify for an exemption under securities regulation. IDM proceeded with plans to conduct an initial private stock offering to raise \$600,000 from an anticipated six or seven investors, and relied on counsel's expertise to ensure compliance with applicable regulatory requirements. IDM had been advised earlier by Mr. Daly or Ms. Weathersby that the firm would not handle a public offering without associating with outside counsel.
9. In order to satisfy provisions of RSA 421-B:17(II)(k), Mr. Daly and Ms. Weathersby prepared the necessary Subscription Agreement and Private Offering Memorandum (occasionally referred to collectively as "offering documents") for distribution to IDM's prospective investors. These materials, with instructions from counsel, were forwarded to IDM on March 30, 2000.

10. The Subscription Agreement that was presented to each subscriber for the sale of the stock provided that no more than \$600,000 in cash would be raised by the offering. Under the terms of the Private Offering Memorandum, IDM represented that it was “offering 10 Units (the ‘Units’) each consisting of 60,000 shares of common stock of the Company (the ‘Shares’), at a price of \$60,000 per unit (or \$1.00 per share) for a total offering maximum of \$600,000 (the ‘Offering’).”
11. Regulatory requirements in the State of New York were addressed by filing a “No Action Request Letter” with the New York State Department of Law, Investor Protection and Securities Bureau (“N.Y. Bureau”). In her letter of February 10, 2000, to the N.Y. Bureau, Ms. Weathersby confirmed IDM’s intent to limit its offering, and that it expected only one investor from New York.
12. On April 3, 2000, IDM completed its initial private offering, with sales to 20 investors (including partial units), for a total of \$635,000. On April 5, 2000, Stuart J. Sheppard, Vice President of IDM, notified counsel that the company had raised more money than expected. Mr. Daly and Ms. Weathersby conferred by e-mail about the over-subscription and problems associated with representations and limitations contained in the offering documents. Mr. Daly raised the question whether the Private Offering Memorandum would allow IDM to increase the number of “units” sold.
13. The subscription agreements executed by the investors were delivered to Mr. Daly's law firm on April 10, 2000. Ms. Weathersby promptly reviewed the documents and sent an e-mail to Messrs. Leggett and Sheppard with her observations. The documents confirmed that excess funds had been raised and that a total of 20 investors had subscribed to the initial private offering.
14. In her e-mail to IDM dated April 10, 2000, Ms. Weathersby noted in pertinent part, as follows:
 1. As I calculate the dollars raised by the initial subscription, the total is \$634,000 [sic] which is \$35,000 more than the offering allowed. . . . No matter what you do, IDM has to return \$35,000. Please let us know how you are handling this, as it will affect the shares to be issued to each investor.
 4. Because there are so many investors (I thought you were raising money from ten investors?), we need to order additional stock certificates. They come in books of twenty and we have already prepared certificates for the principals. . . . Let us know if there are certain shareholders that you would definitely like to get certificates promptly, otherwise, we’ll just prepare them in alphabetical order and the last few investors will have to wait for the new certificates.

Ms. Weathersby did not make any reference to the question whether the initial offering still qualified for the exemption under RSA 421-B:17(II)(k).

15. On the following day, April 11, 2000, Mr. Daly and Ms. Weathersby spoke via telephone with Messrs. Sheppard and Leggett about the excess funds raised in the offering. Ms. Weathersby described the *substance* of the conversation in her memorandum of April 11, 2000. She refers to a discussion of options, including amending the subscription agreement (with subscriber assent) to reflect the actual amount of money raised, returning some of the funds, or doing nothing. Ms. Weathersby also reported discussing the need to file a revised "No Action Request Letter" with the State of New York.
16. Ms. Weathersby's memorandum of April 11, 2000, makes no reference to a conversation about whether, with sales to 20 investors, the offering might no longer qualify for the RSA 427-B:17(II)(k) exemption.
17. Mr. Daly and Ms. Weathersby amended the offering documents to provide for the increased dollar amount of money raised and to exercise IDM's option to increase the number of units sold.
18. On April 14, 2000, Ms. Weathersby prepared a "Form D Notice of Sale of Securities" to be filed with the U.S. Securities and Exchange Commission. IDM disclosed in the form that 20 accredited investors had participated in the initial offering, generating a total of \$635,000 in sales.
19. On April 18, 2000, Ms. Weathersby filed a revised "No Action Request Letter" with the N.Y. Bureau. She disclosed that the sale had raised more money than anticipated and that 20 investors had participated instead of the fewer than 10 expected. There had been no change in the projected participation of a single investor from New York.
20. According to Mr. Daly's firm's time and billing records, on May 10-11, 2000, stock certificates for each of the investors in the initial offering were prepared in Mr. Daly's firm's office and sent to IDM.
21. After completing the initial offering, Ms. Weathersby reviewed and made notes of data from the initial offering, including a tally of the number of investors that had participated from each state.
22. Shortly after the initial offering, Mr. Sheppard advised Ms. Weathersby that IDM was interested in raising additional funds through a second offering. Ms. Weathersby did some preliminary research of applicable state regulatory requirements.
23. In a letter to IDM dated June 6, 2000, which, according to Mr. Daly's time and billing records was reviewed by Mr. Daly, Ms. Weathersby addressed several issues relating to the proposed second stock offering. In order to minimize regulatory requirements

triggered when private financing exceeds \$1,000,000, IDM could not raise any more than \$364,000 in the second offering. With particular regard to New Hampshire, Ms. Weathersby informed IDM of the following:

1. IDM's second stock offering will not be exempt from registration requirements;
2. An offering memorandum and several uniform disclosure forms must be filed with the New Hampshire Bureau of Securities Regulation (hereinafter referred to as the "Bureau");
3. The Bureau will review the material and advise IDM whether the State requires additional provisions or information;
4. The approval process could take as little as two weeks, but it could also last for one to three months;
5. Total fees will be approximately \$920;
6. IDM must also register as an "issuer-dealer" of its securities, for which additional forms and approximately \$500 in fees are required; and
7. No solicitations under the stock offering are allowed until the Bureau issues its approvals.

24. With respect to scheduling, Ms. Weathersby further advised IDM in her June 6, 2000, letter, as follows:

If this offering needs to be completed by October 1, 2000, we suggest that you allow three (or more) months to prepare. We should allow at least two months to revise the subscription agreement and to meet New Hampshire's requirements, and one to raise the funds. Accordingly, you should contact us by late June about getting started.

I will be out on maternity leave commencing June 25th and will not be returning until October. Therefore, please work with John Daly directly on this matter.

25. As planned, Ms. Weathersby went on maternity leave in the last week of June 2000, leaving Mr. Daly to complete work on the second stock offering.
26. During the period from September 18, 2000, to October 19, 2000, Mr. Daly prepared and supervised the preparation of documents required for registering and conducting the second stock offering.
27. On October 20, 2000, Mr. Daly wrote to the Bureau, enclosing various forms and documents associated with registration of IDM stock and the proposed second offering. He asked the Bureau to review and approve the filings as soon as practicable. Mr. Daly also included the following statement: "Pursuant to exemptions available to it under federal and state laws, earlier this year the Company issued 635,000 common shares to

accredited investors in New Hampshire, Massachusetts, Rhode Island, and New York. The Company proposes to issue an additional 360,000 common shares in units of 30,000 (at \$1.00 per share) to some of those same investors.”

28. By letter dated November 3, 2000, Bureau Director Peter C. Hildreth responded to Mr. Daly's filing. Regarding Mr. Daly's comment about the initial stock offering, Mr. Hildreth asked Mr. Daly to “please give details as to New Hampshire sales including amount and exemption claimed for these sales.” Mr. Hildreth further indicated that a Criminal Records Release Authorization Form supplied by Mr. Daly in connection with the proposed registration required a notarized signature.
29. Mr. Daly did not apprise IDM of Mr. Hildreth's request for information about the first offering when Mr. Daly received Mr. Hildreth's November 3, 2000, letter; nor did he, at that time, send a copy of Mr. Hildreth's letter to IDM.
30. On or about Wednesday, November 8, 2000, Mr. Daly asked Ms. Weathersby, just back from maternity leave, to get involved in preparing the second offering and to take a look at Mr. Hildreth's letter.
31. Upon review of the IDM file, Ms. Weathersby promptly recognized that there was a legal problem with the initial offering. She notified Mr. Daly immediately. Pursuant to Mr. Daly's instructions, Ms. Weathersby prepared a memorandum dated November 10, 2000, summarizing the legal analysis undertaken in connection with the initial offering, preparation of offering documents, and the results of the sale. Ms. Weathersby focused on the issue of compliance with exemption requirements under RSA 421 B:17(II)(k) and possible errors made in this regard.
32. In her memorandum of November 10, 2000, Ms. Weathersby reported finding no documentation in the file confirming the client's understanding that, in order to the qualify for the aforementioned exemption, IDM could sell “shares to 10 or fewer individuals w/in 60 days of the date of incorporation.” Further, reflecting in her memorandum on Mr. Daly's and Ms. Weathersby's response to the results of IDM's initial offering, Ms. Weathersby noted that, “while we were alerted to the fact that the offering memo stated that only \$600,000 would be raised, we did not catch that we were to limit the number of investors to ten.”
33. In her memorandum of November 10, 2000, Ms. Weathersby stated as follows:

Because IDM sold shares to more than ten investors, its offering no longer fits within the limits of this exemption. While the last (highlighted) sentence may provide some relief, we do not have in-house access to the rules of the securities bureau (Securities Division of the Attorney General's Office). Therefore, I cannot determine if the number of persons to whom sales can be made has increased. We can call the securities director and ask, we can visit with him and explain what happened, or take some other course. JVD-any thoughts? We should discuss and plan a course of action. We have not yet discussed with IDM.

34. In a handwritten note to Mr. Daly appearing at the top of the November 10, 2000 memorandum, Ms Weathersby stated as follows:

JVD-

Re IDM

It looks like IDM could be subject to \$2500. fine (for each sale?) and possible jeopardizing of 2nd offering.

PMW.

35. On or before Monday, November 13, 2000, Mr. Daly reviewed the aforesaid memorandum from Ms. Weathersby. He did not thereafter authorize Ms. Weathersby to obtain the legal resources she said she needed to conduct further research of regulatory requirements or otherwise direct her to do more work on the issues confronting them. Nor did he authorize her to contact the Bureau or IDM to disclose and/or discuss the problem.
36. Mr. Daly did not send IDM a copy of Ms. Weathersby's November 10, 2000, memorandum. Nor did Mr. Daly tell IDM about the problem or mistake right after reading the memorandum. Mr. Daly did not want to disclose the problem described in the memorandum to IDM until he could present a solution. Mr. Daly was never able to present IDM with a solution to the problem described in Ms. Weathersby's November 10, 2000, memorandum.
37. Mr. Daly did not meet with the state regulators to fashion a solution to the problem described in Ms. Weathersby's November 10, 2000, memorandum. Mr. Daly did not explain the problem to the state regulators until sending a letter dated January 16, 2001, to the Bureau.
38. Mr. Daly has a vague recollection of a conversation at some point with IDM about the problem with the initial offering, but he has no specific memory of telling IDM that a mistake was made in the initial securities offering.
39. There are no time and billing records, notes, or other record generated or maintained by Mr. Daly or Ms. Weathersby documenting a meeting or telephone conference in which Mr. Daly or Ms. Weathersby told IDM about the problem with the initial offering described in Ms. Weathersby's November 10, 2000, memorandum.
40. After preparing her November 10, 2000, memorandum and giving it to Mr. Daly, Ms. Weathersby periodically checked in with Mr. Daly to ask about the status of the case, including his plan for advising the client and dealing with the legal flaw in the initial offering. At no time did Mr. Daly refer this matter to, or seek the assistance of, outside counsel to determine how to address and solve the legal issues raised in connection with

the initial offering. However, other partners in Mr. Daly's firm were made aware of the issues surrounding the initial offering. Specifically, Mr. Daly recalls that in November or December of 2000, he reported to Attorney Mark Beliveau, the Sanders & McDermott managing partner, that a serious error was made in the IDM representation for which the firm would be responsible. It was not a lengthy conversation, and to the best of Mr. Daly's recollection, dealt only with a potential malpractice complaint and not with the ethical matters that are the subject matter here. Mr. Daly does not recall any specific discussion of what the client (IDM) then knew or did not know. Mr. Daly has been recently advised that Mr. Beliveau does not recall this conversation.

41. Additionally, Ms. Weathersby recalls that on one or possibly two occasions in November 2000, she advised either Mr. Belliveau or Mr. Sanders that there was a problem with IDM that Mr. Daly was not addressing effectively with his client. Mr. Daly has been advised recently that neither Mr. Sanders nor Mr. Belliveau recall such a discussion with Ms. Weathersby.
42. On Monday, November 6, 2000, Mr. Sheppard sent Mr. Daly an e-mail asking about the status of the second offering approval, indicating he would like to "take in funds this week."
43. Mr. Daly responded two days later on November 8, 2000, stating, "I'm still trying to get an answer from the regulators. They have acknowledged our filing and asked a couple of innocuous questions about the first offering, which we have answered, but I still do not have a firm timetable from them. I'll let you know as soon as I know something more but as of now you can't take any money. Sorry."
44. Mr. Sheppard sent another e-mail to Mr. Daly on Tuesday, November 14, 2000, asking if the State could indicate a time frame for completing the process and expressing some concern about losing credibility with IDM's shareholders.
45. On Friday, November 17, 2000, following a telephone call to the Bureau reflected in Mr. Daly's time and billing record of November 16, 2000, Mr. Daly advised Mr. Sheppard as follows: "I'm trying to get an answer for you. Please be patient."
46. On Tuesday, November 21, 2000, Mr. Sheppard sent an e-mail to Mr. Daly expressing frustration with the State for accepting IDM's filing fees without offering any assurances about completing the approval process. He was also concerned about slipping further behind in the scheduling of the offering.
47. On Wednesday, November 29, 2000, Mr. Sheppard sent Mr. Daly an e-mail, stating in pertinent part: "Thanks for the voice mail.... I'm interested in hearing how you made out today in Concord with the State Securities people. Please shoot me a quick update. Thanks for leaving me the message yesterday."
48. Mr. Daly's time and billing records do not reflect that any meeting or contact with State Securities people occurred on or about November 29, 2000. Nevertheless, Mr. Daly promptly reported back to Mr. Sheppard as follows: "No problems to speak of. They've

asked some questions and we had to re-submit a document that did not have an acknowledgment on it. They asked about and we're looking at the initial issue now. I think we should have answers within the next couple of days. I'll let you know of any developments." To Mr. Daly's best recollection, he was going to be in Concord on other business on November 29th and had the intention to stop by the Securities Office regarding the IDM matter. He has no further recollection of actually doing so.

49. On December 5, 2000, and in anticipation of a meeting with prospective investors where he hoped to have the appropriate "paperwork," Mr. Sheppard inquired again as to the status of IDM's filing at the Bureau. Mr. Daly suggested that Mr. Sheppard postpone his meeting.
50. On Friday, December 8, 2000, Mr. Sheppard sent Mr. Daly an e-mail indicating that Mr. Sheppard and a friend planned to bridge IDM's funding privately, but that he needed a time frame on the State approval process in order to make assurances of repayment to the friend. Mr. Sheppard asked Mr. Daly to "put in a call and press them for an answer." Mr. Daly responded with the assurance, "will do." Mr. Daly's time and billing records reflect no such call.
51. On Tuesday, December 12, 2000, Mr. Sheppard sent Mr. Daly another e-mail stating as follows: "Have we heard anything back from these guys? . . . I am trying to overnight the bridge loan paperwork tonight . . . but want to give some type of repayment guidance before doing so." Mr. Daly did not respond.
52. On Wednesday, December 13, 2000, Mr. Sheppard sent Mr. Daly an e-mail indicating that Mr. Daly and Ms. Weathersby were invited to IDM's holiday party at the end of that week.
53. Ms. Weathersby has testified most recently that, prior to the aforementioned December 13, 2001, e-mail, she and Mr. Daly had a conference call with either or both of the IDM principals (John Leggett and Stuart Sheppard) and advised IDM of the problem with the first offering and the need to find a solution. In prior testimony she has indicated that such a conference might have occurred in January 2001. Mr. Daly has a vague recollection of such a call, but he does not remember when it occurred, and in any event, has no specific memory of telling IDM that a mistake was made in the initial securities offering. Mr. Leggett recalls that his only conversation with Mr. Daly's firm about the problem with the number of investors in the first offering was with Ms. Weathersby, alone, and that it occurred in January 2001, when he asked her to transfer the file to new counsel. E-mails exchanged between Mr. Sheppard and Mr. Daly, at least through January 4, 2001, do not indicate that IDM had been made aware of the problem with the first offering, as suggested by Ms. Weathersby.
54. On Wednesday, December 27, 2000, Mr. Sheppard sent Mr. Daly an e-mail, referring to a voice mail message of the preceding day. Mr. Sheppard asked if Mr. Daly had "been able to clarify why Ms. Stone feels nothing will get done in regards to our paperwork until she

- receives verification of the documents she is missing.” Mr. Sheppard asked that Mr. Daly speak to Ms. Stone directly or set up a conference call right away to determine if the approval process was being held up in error.
55. On Wednesday, December 27, 2000, Mr. Daly sent Ms. Stone a letter indicating that, “in accordance with your request, I am enclosing the original Criminal Release and Authorization Form executed by Mr. Sheppard and duly notarized.” The letter did not include a response to the second request in the Bureau’s letter of November 3, 2000: detailed information about the initial stock offering. Mr. Daly sent a copy of this letter to IDM.
 56. On Thursday, December 28, 2000, Mr. Daly sent Ms. Stone a memorandum, prepared in part by Ms. Weathersby, with detailed information about IDM and the initial stock offering held under RSA 421-B:17(II)(k). Mr. Daly disclosed that the offering was over-subscribed and that IDM accepted subscriptions for \$635,000 instead of \$600,000. Mr. Daly also provided general information about the qualifications of the investors, but made no reference to the fact that the offering attracted 20 investors instead of ten. Mr. Daly did not send his client a copy of this memorandum.
 57. On Wednesday, January 3, 2001, Mr. Sheppard sent an e-mail to Mr. Daly acknowledging receipt of a copy of Mr. Daly’s December 27, 2000, letter to Ms. Stone and expressing concern that, in spite of the need for timely approval of IDM’s filing, Mr. Daly had apparently failed to respond to the Bureau’s November 3, 2000, request for information. Mr. Sheppard requested an explanation.
 58. Mr. Daly responded to Mr. Sheppard on January 4, 2001. Mr. Daly indicated that he “certainly believed that these issues had been fully and timely dealt with.” He stated that he had sent the requested criminal release and authorization form to the Bureau twice, but that it did not have the raised notarial seal on it. Mr. Daly conceded that perhaps he should have been more aggressive when dealing with Mr. Hildreth of the Bureau, “but it’s been my experience that you shouldn’t piss off the bureaucrats if it can be avoided.” Further, “whenever I spoke with him [Mr. Hildreth], I came away thinking that we were making headway. Until Becky told you that the file was on her desk, I believed that they were processing it. In fact, I was getting worried that they had some issue that they were concerned about and were going to spring it on us.”
 59. Mr. Daly acknowledges that his statement in the January 4, 2001, message to Mr. Sheppard about the issues having been fully and timely dealt with was not true. In his message of January 4, 2001, to Mr. Sheppard, Mr. Daly made no reference to the legal problems associated with the initial offering, in spite of Mr. Daly’s awareness of such problems at the time of this communication. Other than a “telephone conference with N.H. Department of Securities Regulation,” Mr. Daly’s time and billing records reflect no communications with Mr. Hildreth during November or December, 2000.

60. Mr. Sheppard responded to Mr. Daly's explanation with words of appreciation and the observation that "one day I will learn patience with State agencies. . . ."
61. By letter dated January 5, 2001, Bureau Staff Attorney Jeffrey D. Spill, Esquire, wrote to Mr. Daly and requested a corrected Form U-2. He also requested a copy of the subscription agreements executed for all shares outstanding and a copy of the corporation shareholders list, including the name, address, date of transaction, and number of shares, for all shareholders and securities issued to date.
62. On Thursday, January 11, 2001, Mr. Sheppard asked Mr. Daly for a status report. Mr. Daly responded by e-mail on the following day, informing Mr. Sheppard of Mr. Spill's recent correspondence and request, and promising to hand-deliver a package of information to the Bureau.
63. On January 16, 2001, Mr. Daly wrote to the Bureau. With his letter, he delivered information requested by Mr. Spill. Mr. Daly also made the following representation:

It has come to our attention that when IDM Software Inc.'s initial offering became oversubscribed, it inadvertently may have exceeded the shareholder maximum permitted under RSA 421-B:17(II)(k). If so, we ask the number of persons to whom sales may be made under this exemption be increased to allow for the over-subscription or that the registration now underway apply retroactively to the prior sales.
64. On January 17, 2001, Mr. Sheppard requested a further update, expressing concern that the company might soon have to make some significant operational changes if there was further delay in the offering approval.
65. Shortly after Mr. Daly sent his January 16, 2001, letter to Mr. Spill, IDM terminated its relationship with Mr. Daly and his law firm and instructed Mr. Daly to transfer the file to new counsel.
66. IDM retained Thomas P. Manson, Esquire, of Cook, Little, Rosenblatt & Manson of Manchester, N.H., to represent its interests before the Bureau.

Regulatory issues associated with IDM's initial offering were resolved upon execution of a Consent Decree dated February 21, 2001. IDM acknowledged its failure, among other things, to obtain the requisite issuer-dealer license to conduct the initial offering; it agreed to pay a \$3,000.00 fine; and it pledged to take additional corrective action necessary in order to satisfy state and federal securities law. IDM was allowed to proceed with a second stock offering, provided the offering documents included a disclosure of the regulatory issues encountered in connection with the initial offering. IDM went out of business in May, 2001.

II. RULES VIOLATED

The Professional Conduct Committee has determined that the record supports the following Rule violations by clear and convincing evidence:

67. N.H. R. Prof. Conduct 1.3(a): Diligence; 1.4(a-b): Client Communications; and 8.4(c): Candor.

Rule 1.3(a): Diligence

68. Allegations set forth above are incorporated by reference.
69. Upon completion of the initial stock offering in April, 2000, Mr. Daly was informed that the offering had been over-subscribed. As of that time, Mr. Daly was aware, or should have been aware, that the initial stock offering may not have been conducted in compliance with state and federal law.
70. Mr. Daly owed a duty to his client to respond with reasonable promptness and diligence in addressing the legal issues raised in connection with the initial offering.
71. Mr. Daly failed to take prompt, reasonable and appropriate corrective measures in an effort to render the subject initial offering in compliance with state and federal law and otherwise to protect his client's interests.
72. Mr. Daly also owed his client a duty of promptness and diligence in connection with obtaining regulatory approval to conduct a second stock offering, including obtaining approval of IDM as an "issuer-dealer" of securities under New Hampshire law.
73. Mr. Daly failed to exercise diligence in pursuing regulatory approval of the aforesaid second stock offering by failing to provide the Bureau with complete and accurate information in a timely fashion. This included Mr. Daly's failure to respond promptly and completely to the Bureau's request of November 3, 2000, for information relating to IDM's initial stock offering.
74. Mr. Daly's failure to exercise diligence as set forth herein subjected his client to avoidable harm, including regulatory sanctions in connection with the initial stock offering, and failure, or significant and costly delay, in obtaining approval of the second stock offering.
75. Mr. Daly's failures as set forth herein constitute clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.3(a).

Rule 1.4(a-b): Client Communications

76. Allegations set forth above are incorporated by reference.
77. Mr. Daly had a duty to keep IDM reasonably informed regarding any legal issues associated with the initial stock offering and the status of the Bureau approval process for the second stock offering. He also had a duty to explain the legal and practical aspects pertaining to both matters, as well as alternative courses of action, so as to permit IDM to make informed decisions regarding the representation.
78. Upon learning that the initial offering may not have been conducted in conformity with state and federal law, Mr. Daly failed to inform IDM of the material facts and practical and legal issues arising there from.
79. Further, notwithstanding numerous contacts and inquiries from his client commencing in November, 2000, regarding efforts to obtain Bureau approval of a second stock offering, Mr. Daly failed to provide IDM with complete and accurate information.
80. Mr. Daly's failure to discuss with his clients the legal and practical aspects of problems associated with IDM's stock offerings and the available alternative courses of action in a timely manner, compromised IDM's ability to make informed and timely decisions about the representation.
81. Mr. Daly's failures as set forth herein constitute clear and convincing evidence of a violation of N.H. R. Prof. Conduct 1.4(a)-(b).

Rule 8.4(c) Candor

82. Allegations set forth above are incorporated by reference.
83. Mr. Daly owed IDM a duty of candor in connection with all matters having to do with Mr. Daly's representation.
84. On various occasions from and after November, 2000, Mr. Daly undertook to deceive IDM by providing it with false, misleading, or incomplete information about the status of regulatory matters before the Bureau.
85. As a consequence of Mr. Daly's conduct in this regard, IDM was unaware that the initial stock offering was probably not conducted in compliance with state and federal law, and it was led to believe that state approval of a second stock offering was proceeding on course.
86. Mr. Daly withheld from IDM the Bureau's November 3, 2000, request for information about the initial offering.

87. Mr. Daly also withheld from IDM Ms. Weathersby's November 10, 2000, memorandum, acknowledging the law firm's failure to deal with the exemption issue when it first appeared in April, 2000.
88. Mr. Daly repeatedly breached his duty of candor to the client when responding to inquiries from IDM regarding the status of pending regulatory matters.
89. In his e-mail to Mr. Sheppard of November 8, 2000, Mr. Daly reported that "I'm still trying to get an answer from the regulators. They have asked a couple of innocuous questions about the first offering, which we have answered. . . ." Mr. Daly should have known that the Bureau probably would not proceed with the approval process without a response to its letter of November 3, 2000, requesting information not yet supplied by Mr. Daly. Further, in addition to a notarized form, the Bureau asked for substantive information about the initial offering. Considering the circumstances of the initial offering known to Mr. Daly, the Bureau's question was not fairly characterized as "innocuous." Further, Mr. Daly acknowledges that the Bureau's "questions," had not been "answered."
90. All of Mr. Daly's subsequent responses to IDM's inquiries, as described herein, were made after conferring with Ms. Weathersby and after reviewing her memorandum of November 10, 2000, which clearly identified the legal flaw in the initial offering and the firm's failure to address the issue. Mr. Daly also knew that the legal problem and the firm's failure to act would be exposed once Mr. Daly provided the Bureau with the information it sought in its November 3, 2000, letter.
91. In his e-mail to Mr. Sheppard of November 29, 2000, Mr. Daly appeared to report on the results of a meeting with the Bureau personnel, assuring IDM that there were "no problems to speak of." There is no record of the alleged meeting. Moreover, if, indeed, a meeting or conversation occurred, Mr. Daly misrepresented the results. Because Mr. Daly had not yet supplied the Bureau with information it requested regarding the initial offering, the Bureau was not yet in a position to identify any "problems." Accordingly, Mr. Daly had no credible basis for offering such reassurance to IDM.
92. Mr. Daly did not respond to the Bureau's November 3, 2000, inquiry until after Mr. Sheppard contacted the Bureau on his own and found out that IDM's filing was not being processed.
93. In his December 28, 2000, memorandum to Ms. Stone of the Bureau, Mr. Daly purported to supply material facts pertaining to the initial offering held in compliance with RSA 421 B:17(II)(k). While acknowledging that the offering generated excess funds, his account made no reference to the number of investors involved.
94. On January 4, 2001, Mr. Daly responded to IDM's message expressing concern that he had failed to respond in a timely fashion to the Bureau's November 3, 2000, request for information. Mr. Daly offered a further mischaracterization of events and his

performance by attributing the delay in processing the approvals to bureaucratic mishandling, while falsely claiming that he had been in touch with Mr. Hildreth and that he was led to believe that “we were making headway.”

95. Ms. Weathersby testified that from the time she first informed Mr. Daly that there were too many investors; it was her impression that Mr. Daly was not trying to cover up or hide some error. Mr. Daly told Attorney Weathersby to put everything about the problem in a written memo to him so that they could look into what could be done to correct the problem. After submitting the memo and discussing the problem with Mr. Daly, Ms. Weathersby came to observe that Mr. Daly was not dealing with this matter for whatever reason, that “he was sort of frozen.” Ms. Weathersby did not see any of the e-mails between Messrs. Daly and Sheppard during the November/December time frame.
96. Mr. Daly’s conduct as set forth herein constitutes clear and convincing evidence of conduct involving misrepresentation in violation of N.H. R. Prof. Conduct 8.4(c).

III. SANCTION

Having made the above findings and rulings, the Professional Conduct Committee concludes that the appropriate discipline in this matter is a Public Censure. There were extensive deliberations by the Committee regarding the appropriate sanction for this serious misconduct. The Committee gave substantial weight in its decision to the fact that the misconduct occurred seven years ago and that no professional conduct complaints have been filed against Mr. Daly during that ensuing period. Assistant Disciplinary Counsel and Mr. Daly also jointly recommend a Public Censure as the appropriate sanction in this matter. The Committee believes that this sanction will serve the purposes of attorney discipline.

Both case law in New Hampshire and the American Bar Association’s Standards for Imposing Lawyer Sanctions (1992) (“Standards”) support the conclusion that Mr. Daly should be publicly censured. The purpose of the Court’s disciplinary power “is to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future.” E.g., Coffey’s Case, 152 N.H. 503, 513 (2005) (internal quotation marks omitted). “The sanction must take into account the severity of the misconduct.” Id. Although the Court has not adopted the Standards, it looks to them for guidance. Coffey’s Case, 152 N.H. at 513. The Standards set forth a four part analysis for courts to consider in imposing sanctions: “(a) the duty violated; (b) the lawyer’s mental state; (c) the potential or actual injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” Standards § 3.0; Coffey’s Case, 152 N.H. at 513.

The first three steps create the framework for characterizing the misconduct and determining a baseline sanction. See Wolterbeek’s Case, 152 N.H. 710, 714 (2005) (“In applying these factors, the first step is to categorize the respondent’s misconduct and identify the appropriate sanction”). Once the baseline sanction is determined, the Court then looks to the fourth and final step in the analysis: the existence of any aggravating or mitigating factors and

whether they affect the baseline sanction. See id. (“After determining the sanction, [the Court] considers the effect of any aggravating or mitigating factors on the ultimate sanction.”).

Under the first prong of the analysis, Mr. Daly’s misconduct can be fairly categorized as (a) a lack of diligence in undertaking to perform services necessary to address significant regulatory issues raised in connection with a stock offering conducted by the client in reliance upon Mr. Daly’s counsel; and (b) lack of candor with his client, by engaging in a series of misrepresentations to the client over a period of approximately two months regarding the existence of, and work being done to resolve, such regulatory issues.

To determine the baseline sanction, the Standards next require analysis of both Mr. Daly’s state of mind and the injury and potential injury caused by his misconduct. With respect to Mr. Daly’s mental state, the evidence is clear on each of Mr. Daly’s violations that he acted at least knowingly.

With respect to injury, Mr. Daly’s conduct placed his client at risk of being assessed penalties for violations of securities regulations and of being denied authority to proceed timely with further stock offerings. As a consequence of Mr. Daly’s conduct, the client, in fact, was assessed a penalty and approval of a second offering was delayed. The client also had to execute a consent decree and was required to disclose the existence of such consent decree in any future offerings. In short, the injury in this matter was significant.

Section 4.4 of the Standards deals with a lawyer’s lack of diligence. Section 4.12 indicates that suspension is appropriate where a lawyer “knowingly fails to perform services for a client and causes injury or potential injury to a client.” Standards § 4.12. Section 4.62 recommends suspension where “a lawyer knowingly deceives a client, and causes injury or potential injury to a client.” Standards § 4.62.

In light of the foregoing, the baseline sanction for Mr. Daly’s misconduct is some form of suspension.

The final step in the sanction analysis is to determine whether there are any aggravating and/or mitigating factors that affect the baseline sanction.

There are numerous mitigating factors in this case including the following:

- a. Absence of a prior disciplinary record;
- b. Absence of a selfish motive;
- c. Personal or emotional problems, including a diagnosis of depression and anxiety;
- d. Prompt effort to rectify consequences of misconduct following partial discovery of same by i) cooperating with

IDM's successor counsel and immediately turning over client's file; and ii) private disclosure to Mr. Daly's firm and insurance carrier that there was no defense to malpractice liability;

- e. Open disclosure to disciplinary counsel and cooperative attitude toward the disciplinary proceedings;
- f. Good character and reputation;
- g. Delay in the disciplinary proceedings that includes a complaint being filed in February 2004, over three years after the misconduct occurred in November/December 2000 and January 2001, plus a further delay in processing the case, with a total delay of over six years from the time of misconduct to this resolution;
- h. Interim rehabilitation including ongoing, successful treatment for depression and anxiety;
- i. Imposition of other penalties or sanctions, including resolution by settlement of a malpractice claim by IDM and Mr. Daly's leaving present employment as a direct result of this Stipulation;
- j. Since the time of the misconduct at issue in late 2000, no subsequent misconduct up to the present time; and
- k. Remorse.

See Standards § 9.32. Welts' Case, 136 N.H. 588 (1993).

There is only one aggravating factor in this matter: Mr. Daly's substantial experience in the practice of law. See Standards § 9.2.

Case law dealing with the question of how to determine the appropriate sanction in a case involving attorney deceit reveals that there is a broad spectrum of sanctions from public censure to disbarment. The severity of the sanction depends primarily on two factors: (a) the nature of the deceit, and (b) the quality of any mitigating factors. Where the deceit involves self-dealing, a harsher sanction is generally warranted. See Wolterbeek's Case, supra. Where, as here, the deceit does not involve self-dealing and compelling mitigators are present, the Court has imposed a Public Censure. See Welt's Case, 136 N.H. 588 (1993).

The fact pattern in Welts' Case is similar that which confronts the Committee in this case and the Court's disposition in Welts' Case is instructive. Attorney Welts deceived his clients by

manufacturing a false scenario of events and lying about his efforts to file suit on their behalf, and then failing to correct the misrepresentation for a period of six months. Id. at 590. Although the potential injury to the clients was substantial, the Court viewed the misconduct as an isolated event and gave great weight to the fact that, at the time of the misconduct, the attorney was going through difficult personal and emotional issues; he had been diagnosed with depression and adjustment disorder; he was cooperative in the disciplinary process; and he was sincere in his expression of remorse for the misconduct. Id. at 592-93.

Mr. Daly's conduct, involving misleading or false communications with his client over a two-month period, was directed at putting off the client until Mr. Daly could deal with the legal issues at hand. As in Welts' Case, the misconduct can be viewed as involving an isolated event or episode. Further, Mr. Daly's deceit did not involve self-dealing and his mitigating factors are equally as compelling as Mr. Welts'.

In sum, taking into consideration both the four-part analysis recommended by the Standards, as well as the purposes of attorney discipline in New Hampshire, the appropriate sanction in this matter is Public Censure. See Welts' Case, supra. See also O'Meara's Case, 150 N.H. 157, 159 (2003).

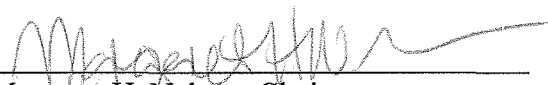
IV. COSTS

The Professional Conduct Committee orders Mr. Daly to pay the expenses incurred by the Committee in the investigation and prosecution of this matter, as stipulated to by him.

V. CONCLUSION

For the above reasons, the Professional Conduct Committee issues a Public Censure to John V. Daly for violating N.H. Prof. Conduct Rules 1.3(a); 1.4(a-b); and 8.4(c).

July 23, 2007

By: 
Margaret H. Nelson, Chair

Distribution:

James L. Kruse, Assistant Disciplinary Counsel
Stephen L. Tober, Esquire
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